82-717

Office - Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1982

TERRACE WEST, INC.,
Petitioner,

against

THE CITY OF PLATTSBURGH, NEW YORK,
Respondent,

and

THE STATE OF NEW YORK,
Intervenor.

ON APPEAL FROM THE APPELLATE DIVISION, THIRD DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI

J. BYRON O'CONNELL
O'CONNELL & WOLFE
Attorneys for Petitioner
10 Healey Avenue
Plattsburgh, NY 12901
(518) 561-1440

Question Presented.

Are Articles 2 and 4 of the New York State Eminent Domain Procedure Law facially and in fact unconstitutional in that they permit a taking of private lands without due process, without allowing the private landowner the right to an impartial hearing before an impartial arbitrator on the issue of whether his property need be taken, or, in other words, does the Due Process Clause apply to property owners as well as to felons?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

TERRACE WEST, Inc.,

Petitioner,

against

THE CITY OF PLATTSBURGH, NEW YORK,

Respondent,

and

THE STATE OF NEW YORK,

Intervenor.

ON APPEAL FROM THE APPELLATE DIVISION, THIRD DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK.

Petition for Certiorari.

Opinions Below.

Petitioner, Terrace West, Inc., first appealed in this action following the publication by the respondent, City of

Plattsburgh, of its determination and findings in this matter, and its resolution deciding that the taking was proper. The Appellate Division, Third Department's decision affirming the determination is reported at 73 A. D. 2d 763, 423 N. Y. S. 2d 296. The subsequent decision denying petitioner's motion for re-argument is not reported. The decision of the Appellate Division affirming the order permitting the respondent City of Plattsburgh to file an acquisition map is reported at ____ A. D. 2d ____, 499 N. Y. S. 2d 343. The decision of the Appellate Division denying petitioner's motion for re-argument or, in the alternative, for leave to appeal to the Court of Appeals is not yet reported; neither is the decision of the Court of Appeals of the State of New York denying petitioner leave to appeal to that Court.

The memorandum-decision and order of the United States District Court, Northern District of New York, dismissing plaintiff Terrace West, Inc.'s complaint is not reported. Copies of all of these are annexed hereto as part of the Appendix.

Grounds for Jurisdiction.

The decision sought to be reviewed is that of the Appellate Division, Third Department, dated March 25, 1982. An order was entered thereon on March 30, 1982. Terrace West, Inc.'s motion to the Appellate Division for leave to re-argue, or, in the alternative, for leave to appeal to the Court of Appeals was denied by decision dated May 11, 1982, the order thereon was entered May 18, 1982. Petitioner's motion to the Court of Appeals for leave to appeal to that Court was denied by order dated and entered September 8, 1982. The jurisdiction of this Court is pursuant to 28 U. S. C. 1257 (3).

Constitutional Provisions and Statutes Involved.

United States Constitution, Fourteenth Amendment, Section 1:

> Section 1. Citizens of the United States.
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Eminent Domain Procedure Law:

> §201. Public hearings
>
> Except as provided herein, prior to acquisition, the condemnor, in order to inform the public and to review the public use to be served by a proposed public project and the impact on the environment and residents of the locality where such project will be constructed, shall conduct a public hearing in accordance with the provisions of this article at a location reasonably accessible to the property owners whose property might be acquired for such project.

§202. Notice

(A) Where a public hearing is required by this article the condemnor shall give notice to the public of the purpose, time and location of its hearing setting forth the proposed location of the public project including any proposed alternate locations, at least ten but no more than thirty days prior to such public hearing by causing such notice to be published in at least five successive issues of an official daily newspaper if there is one designated in the locality where the project will be situated and in at least five successive issues of a daily newspaper of general circulation in such locality.

(B) In the event that the only newspaper available in such locality is a weekly publication the above described notice shall be published in such newspaper in at least two successive issues.

(C) Failure to notify a person or persons entitled to notice under this section shall not be jurisdictional nor construed to affect the validity of any title acquired by a condemnor under this law.

§203. Conduct of the public hearing

At the public hearing the condemnor shall outline the purpose, proposed location or alternate locations of the public project and any other information it considers pertinent, including maps and property descriptions of the property to be acquired and adjacent parcels. Thereafter, any person in attendance shall be given a reasonable opportunity to present an oral or written statement and to submit other documents concerning the proposed public project. A record of the hearing shall

be kept, including written statements submitted. The condemnor's copy of such record shall be available during normal business hours, at its principal and district offices to the public for examination without cost and shall be reproduced upon written request and payment of the cost thereof. Further adjourned hearings may be scheduled.

§204. Determination and findings

(A) The condemnor, within ninety days after the conclusion of the public hearings held pursuant to this article, shall make its determination and findings concerning the proposed public project and shall publish a brief synopsis of such determination and findings in at least two successive issues of an official newspaper if there is one designated in the locality where the project will be situated and in at least two successive issues of a newspaper of general circulation in such locality. The synopsis shall include those factors set forth in subdivision (B) herein, and shall also state that copies of the determination and findings will be forwarded upon written request without cost.

(B) The condemnor, in its determination and findings, shall specify, but shall not be limited to the following:

(1) the public use, benefit or purpose to be served by the proposed public project;

(2) the approximate location for the proposed public project and the reasons for the selection of that location;

(3) the general effect of the proposed project on the environment and residents of the locality;

(4) such other factors as it considers relevant.

§207. Judicial Review

(A) Any person or persons jointly or severally, aggrieved by the condemnor's determination and findings made pursuant to this article, may seek judicial review thereof by the appellate division of the supreme court, in the judicial department embracing the county wherein the proposed facility is located by the filing of a petition in such court within thirty days after the condemnor's completion of its publication of its determination and findings pursuant to section two hundred four herein. Such petition shall be accompanied by proof of service of a demand on the condemnor to file with said court a copy of a written transcript of the record of the proceeding before it, and a copy of its determination and findings. Upon receipt of such petition and demand, the condemnor shall forthwith deliver to the court a copy of the record and a copy of its determination and findings. The proceeding shall be heard on the record without requirement of reproduction. If such proposed public improvement is located in more than one judicial department such proceeding may be brought in any one, but only one of such departments and all such proceedings with relation to any single public project shall be consolidated with the first filed.

(B) The jurisdiction of the appellate division of the supreme court shall be exclusive and its judgment and order shall be final subject to review by

the court of appeals in the same manner and form and with the same effect as provided for appeals in a special proceeding. All such proceedings shall be heard and determined by the appellate division of the supreme court, and by the court of appeals, as expeditiously as possible and with lawful preference over other matters.

(C) The court shall either confirm or reject the condemnor's determination and findings. The scope of review shall be limited to whether:

(1) the proceeding was in conformity with the federal and state constitutions,

(2) the proposed acquisition is within the condemnor's statutory jurisdiction or authority,

(3) the condemnor's determination and findings were made in accordance with procedures set forth in this article, including, where applicable, a determination that an acquisition is exempt from compliance with this article, and

(4) a public use will be served by the proposed acquisition.

§402. Filing of acquisition maps; vesting

* * *

(B) In all acquisitions under supreme court jurisdiction provided in subdivision (B) of section five hundred one herein, the condemnor, prior to filing an acquisition map within the time prescribed

by section four hundred one, shall obtain an order to acquire such property and for permission to file such map by presentation of a verified petition to the supreme court in the judicial district where the real property to be acquired or any part thereof, is situated, in accordance with the following procedure:

(1) The condemnor shall cause to be filed in the office of the clerk of each county where the real property to be acquired or any part thereof is situated, a notice of the pendency of such proceeding. Such notice shall briefly state the object of the proceeding and shall contain a general description by metes and bounds or by section, block and lot number of the real property to be acquired thereby. It shall also state the names of such of the reputed condemnees of such real property as may be known to the condemnor, and in case any of the condemnees are unknown, a statement to that effect shall be made in such notice.

(2) The condemnor shall, at least twenty days prior to the return date of the petition, serve by registered or certified mail return receipt requested, a notice of the time, place and object of the proceeding upon the last known owner or owners of record of the property to be acquired, as the same appears from the record of the tax assessor of the district wherein such parcel or parcels are located. Said notice shall contain a copy of that portion of the proposed acquisition map affecting the owner's property. At least ten but not more than thirty days before the return date of the application, the condemnor shall also cause a copy of a diagram or

representation of the acquisition map showing the perimeters to be acquired and a notice generally describing the property to be acquired by metes and bounds or by section, block and lot numbers, to be advertised by publishing in at least ten successive issues of an official newspaper if there is one designated in the locality where the property is situated, and in at least ten successive issues of a newspaper of general circulation in such locality. In the event that the only newspaper available in such locality is a weekly publication the above described notice shall be published in such newspaper in at least three successive issues. Where the condemnor has conducted an article two public hearing or when the condemnor is exempt from compliance with article two pursuant to section two hundred six the condemnor may dispense with the requirement of publication in ten successive issues of a newspaper of general circulation. Where practicable, the condemnor shall cause copies of such notice in the form of handbills to be posted for the same period in at least three conspicuous places, upon or near such real property. The inadvertent failure to notify any condemnee, whether of record or not, will not invalidate any proceedings brought hereunder or any title acquired by the condemnor under this law.

(3) The condemnor shall present to the Court a petition verified by an authorized officer of the condemnor setting forth:

(a) a statement providing either the compliance with the requirements of article two of this law, including a copy of the condemnor's determination

and findings or a statement providing the basis of exemption from article two;

(b) a copy of the proposed acquisition map to be filed and the names and places of residence of the owners of the property to be acquired;

(c) a description of the real property to be acquired and its location, either by metes and bounds of each individual parcel, or section, block and lot number, and by reference to the acquisition map and notice of pendency attached to the petition;

(d) the public use for which the property is required;

(e) a request that the court direct entry of an order authorizing the filing of the acquisition map in the office of the appropriate county clerk or register and that upon such filing, title shall vest in the condemnor;

(f) if a non-governmental condemnor subject to the jurisdiction, supervision and regulation of the public service commission or the commissioner of transportation, it shall include in its petition for acquisition, notice that it shall deposit a bond or undertaking with the clerk of the court prior to vesting of title to the real property described in such petition in an amount to be fixed by the court on the return date of the petition. The court shall direct that the bond or undertaking will be applied in the amount necessary, for any default by the condemnor in the payment of all or part of the damages determined in the acquisition proceeding or the abandonment thereof.

The requirement for a bond or undertaking under this subdivision, may be waived by stipulation of the parties. If the amount deposited is insufficient to pay such damages and all costs and expenses awarded to a condemnee, judgment shall be entered against the condemnor for the deficiency, to be enforced and collected in the same manner as a judgment in the supreme court;

(g) if the property is to be used for the construction of a major utility transmission facility, as defined in section one hundred twenty of the public service law, or major steam electric generating facility as defined in section one hundred forty of such law with respect to which a certificate of environmental compatibility and public need has been issued under such law, a statement that such certificate relating to such property has been issued and is in force.

(4) Upon the presentation of the petition and notice with proof of service thereof, an owner of the property may appear and interpose a verified answer, which must contain specific denial of each material allegation of the petition controverted by him, or of any knowledge or information thereof, sufficient to form a belief, or a statement of new matter constituting a defense to the proceeding.

(5) At the time and place mentioned in such notice, unless the court shall adjourn the application to a subsequent date, and in that event at the time and place to which the same may be adjourned, upon due proof of service of notice and upon filing of such petition and proof to its

satisfaction that the procedural requirements of this law have been met, the court shall direct the immediate filing and entry of the order granting the petition, which order the condemnor shall file and enter together with the acquisition map, in the office of the county clerk or register in each county in which the real property or any part thereof is situated. Upon the filing of the order and the acquisition map, the acquisition of the property in such map shall be complete and title to such property shall then be vested in the condemnor.

* * *

Statement of the Case.

The respondent City of Plattsburgh, New York, has taken from the petitioner Terrace West, Inc., a parcel of land. This taking, done in conformity with the Eminent Domain Procedure Law of the State of New York, is in blatant violation of petitioner's constitutional right to due process in the taking of life, liberty or property; therefore, the New York State Eminent Domain Procedure Law is unconstitutional and must be struck down and the taking reversed.

The parcel of land at issue here is a strip sixty-six feet wide, 310 feet long on its southern boundary, 320 feet long on its northern boundary, owned by petitioner Terrace West, Inc. At the time the proceedings under the EDPL began, it was an unpaved, private driveway, adjacent to petitioner's apartment complex, Terrace West. The respondent City of Plattsburgh sought to acquire this parcel to make into a City street. Pursuant to the relevant sections of the EDPL, §201-203, a public hearing was held in the Common Council Chambers, City Hall, Plattsburgh,

New York, on July 26, 1979, to discuss the proposed taking, the "Sandra Avenue Improvement Project" (the minutes of that Public hearing are annexed hereto as A-31). EDPL §201 requires a public hearing to be conducted by the condemnor prior to acquisition, "in order to inform the public and to review the public use to be served by a proposed public project and the impact on the environment and residents of the locality." §202 sets forth the procedures to be followed in giving notice of the hearing. §203 provides for the conduct of the public hearing, and requires the condemnor to outline the project, proposed location and other pertinent information. "Thereafter, any person in attendance shall be given a reasonable opportunity to present an oral or written statement and to submit other documents concerning the proposed public project." The public hearing was conducted by the Mayor of the City of Plattsburgh, with the City Aldermen and concerned citizens present, including the attorney for a private developer to whom the acquisition would be a benefit and who had already offered the City $5,000 as reimbursement for expenses anticipated in acquiring this property and in extending the existing water main. Louis E. Wolfe, the President of Terrace West, Inc., had submitted a statement in opposition to the taking, which was read into the minutes by the Mayor.

On August 16, 1979, the Condemnor City of Plattsburgh made its determination pursuant to EDPL §204, which requires a synopsis as to the public use, benefit or purpose to be served by the proposed public taking, the location and reasons for the selection of the location, the general effect of the proposed project on the environment and residents of the locality and such other factors as it considers relevant (A-56). Also on that date, at a regular meeting of the Common Council of the City of Plattsburgh, a resolution was adopted which resolved that the

respondent "City of Plattsburgh, in accordance with the findings of the Common Council does hereby agree to acquire the subject property for the purposes stated, and the findings of the Common Council are hereby adopted * * * [and] the Corporation Counsel is hereby authorized and directed to proceed with the acquisition of the Terrace West/Sandra Avenue property under the provisions of the Eminent Domain Procedures Law." The resolution further provided for a copy of the resolution to be furnished the private developer (A-61).

Terrace West, Inc., then made application to the Supreme Court of the State of New York, Appellate Division, Third Department, pursuant to §207 of the EDPL, for a judgment rejecting and annulling the findings of the City of Plattsburgh relative to the proposed Sandra Avenue Improvement Project. The application was returnable before the Appellate Division on October 29, 1979. By decision dated December 20, 1979, the Appellate Division confirmed the determination and dismissed Terrace West's petition (A-29). Terrace West, Inc., then moved in the Appellate Division for leave to reargue, "upon the ground that the statute upon which the matter was originally decided, the New York Eminent Domain Procedure Law is unconstitutional because it does not provide for an evidentiary hearing by an impartial tribunal prior to the taking as to whether or not the taking is a private taking or public taking, thus violating the due process clauses of both the New York Constitution and the United States Constitution * * *" By decision dated February 7, 1980, the Appellate Division denied the motion for re-argument (A-26). Terrace West, Inc., then began an action in the United States District Court for the Northern District of New York against the City of Plattsburgh, pursuant to 42 U. S. C. §1983, seeking a declaration from that Court that Article 2 of the New York State

Eminent Domain Procedure Law was unconstitutional, and requesting an injunction against the City enjoining it from taking any actions which would further impair its rights in the private road. That Court held, in a memorandum-decision and order dated July 18, 1980, that the challenge to the constitutionality had been raised and "necessarily decided" by the State Courts; that it could not view the silence of the State Courts on the subject of the constitutionality as a failure on their part to address and decide the issue; and that since Terrace West failed to seek review in the United States Supreme Court, that Court "was precluded from deciding the issue anew" (A-15). A notice of appeal to the Second Circuit was filed, but the appeal was not perfected, as Petitioner decided the action was premature as no taking had yet occurred; this decision on the part of Petitioner was confirmed by the Supreme Court's subsequent decision in *San Diego Gas & Electric Company v. City of San Diego,* 450 U.S. 621, 67 L. Ed. 2d 551.

The City of Plattsburgh then moved in the Supreme Court of the State of New York, County of Clinton, pursuant to EDPL §402, for "permission to file an acquisition map in the Office of the Clerk of the County of Clinton, and upon granting of said order, for vesting of title of certain property" in the City. §402 (B) provides for the acquisition of the lands and vesting of title. It requires the condemnor to obtain an order, from the Supreme Court in the judicial district in which the property is situated, to acquire such property and for permission to file an acquisition map. §402 (B) (5) provides that, upon due proof of service of notice and upon the filing of the petition of the condemnor and "proof to its satisfaction that the procedural requirements of this law have been met, the Court shall direct the immediate filing and entry of the order granting the petition * * * Upon the filing of the Order and the acquisition map, the acquisition of the property in such map shall be complete and title to such property shall then be vested in the condemnor."

Over the opposition of Terrace West, Inc., the petition was granted by order dated June 5, 1981 (A-11). Terrace West, Inc., appealed this decision to the Appellate Division, Third Department, again arguing the unconstitutionality of the Eminent Domain Procedure Law, and further raising the point that this issue had not properly been before the Court previously, as no taking had occurred, citing *San Diego Gas & Electric Company v. City of San Diego, supra.* The Appellate Division, by Decision dated March 25, 1982 affirmed the order (A-8), Terrace West, Inc., then moved in the Appellate Division for leave to reargue, or in the alternative, for leave to appeal to the Court of Appeals. This motion was denied by order dated and entered May 18, 1982 (A-5). Petitioner then made a motion in the Court of Appeals for leave to appeal to that Court. This motion was denied by order dated and entered September 8, 1982 (A-1).

Reasons for Granting the Writ.

The sections of the Eminent Domain Procedure Law cited above are in violation of a landowner's, more specifically, in this instance, Terrace West, Inc.'s constitutionally guaranteed right to due process in actions involving a possible deprivation of property, under the Fourteenth Amendment. Due process, within the meaning of the Fourteenth Amendment, is secured if laws do not subject individuals to an arbitrary exercise of the powers of government. *Missouri P. R. Co. v. Mackey* (1888), 127 U. S. 205, 32 L. Ed. 107, 8 S. Ct. 1161. The words "due process" refer to that law of the land in each state which derives its authority from inherent and reserved powers of state, exerted within limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. *Re Kimmler* (1890), 136 U. S. 436, 34 L. Ed. 519, 10 S. Ct. 930.

Terrace West, Inc., was not afforded this basic due process in the proceedings which took from it a parcel of land; proceedings strictly in accord with the relevant sections of the EDPL. As is set forth in the history of the case, above, the same entity—the Condemnor City of Plattsburgh—originated the plan to take the Terrace West driveway; held the public meeting to inform the public and review the public use to be served by the proposed project, pursuant to EDPL §201; conducted the public meeting, pursuant to EDPL §203; and made a determination and findings as to the proposed project, pursuant to EDPL §204. Thus, the only hearing conducted prior to the taking was conducted by the legislature which had in fact authorized the taking and had commenced the proceeding; there was a merger of the prosecution and the judiciary. There was no impartial tribunal. Petitioner is not claiming that it is entitled to a jury trial, it concedes that it has long been settled that there is no constitutional right to a jury in Eminent Domain proceedings. *U. S. v. Reynolds*, 397 U. S. 14, 25 L. Ed. 2d 12, 90 S. Ct. 803. Petitioner is claiming that at some point in the proceedings, a determination must be made by a neutral party, a third party, an impartial party.

Under the relevant provisions of the EDPL, the Court has two functions. Pursuant to §207, any aggrieved party can seek judicial review of the condemnor's findings and determination in the appropriate Appellate Division. However, in this review, there is no testimony taken under oath for the Court to review, no admissible evidence upon which a decision can be made. The condemnee is not able to cross-examine witnesses. The Court has only the Condemnor's written transcript of the record of the proceedings, and its determination and findings, upon which to decide whether to confirm or reject the condemnor's

determination and findings. The landowner is not afforded due process by this provision.

The second occasion upon which the Court becomes involved in these proceedings is, when, pursuant to §402 (b) of the EDPL, the condemnor petitions the Court for an order permitting it to file an acquisition map and to acquire the property. As is set forth above, the Court's only obligation here is to review the proof of service and determine if the procedural requirements of the law have been met. The landowner is not afforded an opportunity to defend on the merits, to argue the alleged necessity for the taking of the land. The Court acts as a rubber stamp.

The sections of the Eminent Domain Procedure Law discussed above are facially and in effect unconstitutional. Terrace West, Inc., was deprived of its right to due process in the taking from it of its property. The EDPL sections complained of herein subject individuals to an arbitrary exercise of the powers of government; the State's authority is exerted in excess of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.

Articles 2 and 4 of the New York Eminent Domain Procedure Law are unconstitutional, they have deprived petitioner Terrace West, Inc., of its property without due process of law. These articles must be struck down as unconstitutional, and Terrace West, Inc., granted relief.

Respectfully submitted,

J. BYRON O'CONNELL
O'CONNELL & WOLFE
Attorneys for Petitioner
10 Healey Avenue
Plattsburgh, N. Y. 12901
(518) 561-1440

APPENDIX.

Court of Appeals Order, September 8, 1982.

STATE OF NEW YORK,

COURT OF APPEALS.

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eighth day of September A. D. 1982

Present:

Hon. Lawrence H. Cooke, Chief Justice, presiding.

3 Mo. No. 707

IN THE MATTER

OF

THE CITY OF PLATTSBURGH,

Respondent,

vs.

TERRACE WEST, Inc.,

Appellant,

and

THE STATE OF NEW YORK,

Intervenor.

Court of Appeals Order, September 8, 1982

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements relating to opposing affidavits only.

JOSEPH W. BELLACOSA
Clerk of the Court

Appellate Division Order, May 18, 1982.

At a Motion Term of the Appellate Division of the Supreme Court of the State of New York, in and for the Third Judicial Department, held at the Justice Building in the City of Albany, New York, on the 19th day of April 1982.

Present:

Hon. T. Paul Kane,
Justice Presiding.
Hon. Robert G. Main,
Hon. John T. Casey,
Hon. Ann T. Mikoll,
Hon. Paul J. Yesawich, Jr.,
Associate Justices.

CITY OF PLATTSBURGH, NEW YORK,

Petitioner-Respondent,

against

TERRACE WEST, Inc.,

Respondent-Appellant,

and

THE STATE OF NEW YORK,

Intervenor.

Order 41275

Appellate Division Order, May 18, 1982

A motion having been made by the respondent-appellant at this Term of Court in the above-entitled proceeding for an order granting respondent-appellant the right to reargue, or in the alternative, for leave to appeal to the Court of Appeals, upon certified questions, from the order of this Court, entered on March 30, 1982, affirming an order of the Supreme Court, Clinton County, granting petitioner-respondent's application for leave to file an acquisition map in the Clinton County Clerk's office, thereby vesting title to certain property in petitioner-respondent: now, after reading and filing proof of due service of the notice of motion, the affirmation of J. Byron O'Connell, Esq., dated April 7, 1982, in support of the motion, the answering affidavit of Thomas A. Robinson, Esq., sworn to April 14, 1982, in opposition thereto, and the affidavit of Stanley Fishman, Esq., sworn to April 16, 1982, in opposition thereto, and the Court having rendered a decision on the 11th day of May, 1982, it is hereby

ORDERED, that the motion for reargument or, in the alternative, for permission to appeal to the Court of Appeals, be and the same hereby is denied, without costs.

ENTER,

/s/ JOHN J. O'BRIEN
Clerk

Dated and Entered: May 18, 1982

A true Copy
JOHN J. O'BRIEN
Clerk

Appellate Division Decision, May 11, 1982.

SUPREME COURT,

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT.

May 11, 1982

41275

IN THE MATTER

OF

CITY OF PLATTSBURGH, NEW YORK,

Respondent,

v.

TERRACE WEST, Inc.,

Appellant,

and

STATE OF NEW YORK,

Intervenor-Respondent.

Motion for reargument or, in the alternative, for permission to appeal to the Court of Appeals denied, without costs.

Kane, J. P., Main, Casey, Mikoll and Yesawich, Jr., JJ., concur.

Appellate Division Order, March 30, 1982.

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 8th day of February 1982.

Present:

Hon. T. Paul Kane,
Justice Presiding.
Hon. Robert G. Main,
Hon. John T. Casey,
Hon. Ann T. Mikoll,
Hon. Paul J. Yesawich, Jr.,
Associate Justices.

CITY OF PLATTSBURGH, NEW YORK,

Petitioner-Respondent,

against

TERRACE WEST, Inc.,

Respondent-Appellant,

and

THE STATE OF NEW YORK,

Intervenor-Respondent.

Order 41275

Appellate Division Order, March 30, 1982

The appellants having appealed from an order of the Supreme Court at Special Term (Shea, J), entered June 12, 1981, in Clinton County, which in a proceeding pursuant to Article 4 of the Eminent Domain Procedure Law, granted the application of petitioner for leave to file an acquisition map in the Clinton County Clerk's Office, thereby vesting title to certain property in petitioner, and said appeal having been presented during the above-stated Term of this Court, and having been argued by Thomas A. Robinson, Esq., of counsel for petitioner-respondent, Stanley Fishman, Assistant Attorney General, of counsel for intervenor-respondent, and by Michael J. Howley, Esq., of counsel for respondent-appellant, and, after due deliberation, the Court having rendered a decision on the 25th day of March, 1982, it is hereby

ORDERED, that the order appealed from be and the same hereby is affirmed, with one bill of costs to respondents on the appeal.

ENTER,

/s/ JOHN J. O'BRIEN
Clerk

Dated and Entered: March 30, 1982.

A True Copy:
JOHN J. O'BRIEN
Clerk

Appellate Division Decision, March 25, 1982.

SUPREME COURT,

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT.

March 25, 1982 41275

IN THE MATTER

OF

CITY OF PLATTSBURGH, NEW YORK,

Respondent,

v.

TERRACE WEST, Inc.,

Appellant,

and

STATE OF NEW YORK,

Intervenor-Respondent.

Appellate Division Decision, March 25, 1982

Appeal from an order of the Supreme Court at Special Term (Shea, J.), entered June 12, 1981 in Clinton County, which, in a proceeding pursuant to article 4 of the Eminent Domain Procedure Law, granted the application of petitioner for leave to file an acquisition map in the Clinton County Clerk's Office, thereby vesting title to certain property in petitioner.

At issue on this appeal is the proposed taking by petitioner City of Plattsburgh, New York, of a private driveway owned by respondent Terrace West, Inc. The pertinent underlying facts are set forth in our earlier decision in *Matter of Terrace West v. City of Plattsburgh* (73 A D 2d 763, app. dsmd. 49 N Y 2d 916). After Special Term granted petitioner leave to file an acquisition map and thereby acquire title to the subject parcel, respondent filed this appeal wherein it contends that New York's Eminent Domain Procedure Law is unconstitutional because it permits the taking of property without a jury trial even though such a trial is allegedly mandated by section 7 (subd. [c]) of article I of the New York State Constitution.

We hold that the challenged order should be affirmed. Even if we assume tha this appeal is not precluded on the theory of collateral estoppel, a doubtful proposition in that we have previously held that the appropriation in question "is a constitutionally permissible taking for a public purpose" (*Matter of Terrace West v. City of Plattsburgh, supra,* p. 763), we must nonetheless conclude that respondent's arguments are without merit. The constitutional provision cited above upon which respondent relies is plainly inapplicable in this instance because it clearly relates to a private taking of property for the opening of a private road and not to the situation presented here

wherein it has been judicially determined that petitioner is taking property for a public purpose. Moreover, the differences between public and private takings are obvious, and respondent has, therefore, not been denied the equal protection of the law merely because different procedures have been established with regard to public and private takings (cf. *Neale v. Hayduk*, 35 N Y 2d 182, 186; *8200 Realty Corp. v. Lindsay*, 27 N Y 2d 124, app. dsmd. 400 U.S. 962).

Order affirmed, with one bill of costs to respondents on appeal.

Kane, J. P., Main, Casey, Mikoll and Yesawich, Jr., JJ., concur.

Order Appealed From, June 5, 1981.

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Clinton at the Clinton County Government Center in the City of Plattsburgh, New York on the 26th day of February, 1981.

Present:

Hon. Edmund Shea,
Justice.

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF CLINTON.

CITY OF PLATTSBURGH, NEW YORK,

Petitioner,

against

TERRACE WEST, Inc.,

Respondent.

The petitioner above named having applied to this Court for permission to file an acquisition map in the office of the Clerk of the County of Clinton, and upon

granting of said order, for vesting of title of certain property in the petitioner, and the matter having come on to be heard at a Special Term of this Court held in and for the County of Clinton at the Clinton County Government Center in the City of Plattsburgh, New York on the 26th day of February, 1981, and the petitioner having appeared by Thomas A. Robinson, Esq., Corporation Counsel of the City of Plattsburgh, New York, and the respondent having appeared by O'Connell & Wolfe, Esqs., J. Byron O'Connell, Esq., of counsel, in opposition thereto, and David L. Smith, Esq., Assistant Attorney General of the State of New York, having appeared on behalf of the people of the State of New York;

Now, upon reading and filing the notice of petition dated the 12th day of January, 1981; the petition verified December 30, 1980; the answer of the respondent verified February 12, 1981; the reply of the petitioner verified February 25, 1981; the notice of pendency of this proceeding with proof of publication and service thereof; and the petitioner having produced at the hearing the proposed acquisition map and the following copies of documents and decisions in prior proceedings in this matter, viz: resolution of the Common Council of the City of Plattsburgh held August 16, 1979; public notice of determination by the City of Plattsburgh; notice and petition for review by Appellate Division, Third Department; answer of City of Plattsburgh to petition for review; decision of Appellate Division, Third Department, dated December 20, 1979; notice of motion by Terrace West, Inc. for reargument in Appellate Division, Third Department; answering affidavit on behalf of City of Plattsburgh to motion for permission to reargue; reply affidavit of Terrace West, Inc. on motion to reargue; notice of appeal by Terrace West,

Inc. to the Court of Appeals; City of Plattsburgh's motion to dismiss appeal to the Court of Appeals; Appellate Division decision denying motion for reargument; Terrace West, Inc's answering affidavit to City's motion to dismiss appeal in the Court of Appeals; Appellate Division order denying motion for reargument; order of the Court of Appeals dismissing appeal; summons and complaint in United States District Court; City's answer and answering affidavit; order to show cause in United States District Court; City's memorandum in United States District Court; City's memorandum of law on question or jurisdiction in United States District Court; Terrace West, Inc's application for three judge court in United States District Court; Terrace West, Inc's amended complaint in United States District Court; Terrace West, Inc's memorandum in United States District Court; City's answer to amended complaint and reply memorandum on jurisdictional question; memorandum decision and order in United States District Court; order of the United States District Court dismissing complaint; notice of appeal to United States Court of Appeals, Second Circuit; notice of dismissal of appeal by United States Court of Appeals, Second Circuit; and due deliberation having been had, and the Court having handed down its written decision dated May 18, 1981;

Now, on motion of Thomas A. Robinson, Esq., attorney for petitioner, it is

ORDERED that the petition of the City of Plattsburgh, New York be and it hereby is granted and that the proposed acquisition map be filed in the office of the Clerk of the County of Clinton, State of New York, and that upon such filing, title to the following property be vested in the City of Plattsburgh, New York:

Order Appealed From, June 5, 1981

All that certain parcel of land, situate in the City of Plattsburgh, County of Clinton, State of New York, bounded and described as follows: BEGINNING at a point, which point is in the westerly bound of Cogan Avenue and is 386.98 ft. southerly of the south bound of Cornelia Street; and running thence in a westerly direction along the south bound of Lands owned by Dorothy Cogan McDonough a distance of approximately 316.90 ft. to a point, which point is the intersection determined by the continuation of the westerly boundary line of proposed Sandra Avenue; thence southerly along the extended west bound of proposed Sandra Avenue a distance of 66.62 ft. more or less, to a point which is the northwest corner of Lot #27 as shown on the Sandra Avenue Subdivision map #SC-377 drawn by Joseph J. Martina, P.E., L.S.; thence easterly along a line 66 feet distant from the parallel with the south bound of said Doroth Cogan McDonough property a distance of 308.86 feet to an iron pipe set in the west bound of Cogan Avenue; thence northerly a distance of 66.01 ft. to the place of beginning.

Enter:

EDMUND L. SHEA
J. S. C.

Dated: June 5, 1981.

Memorandum Decision and Order, U.S. District Court for Northern District of New York, July 18, 1980.

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF NEW YORK.

TERRACE WEST, Inc.,

Plaintiff,

v.

THE CITY OF PLATTSBURGH, NEW YORK,

Defendant.

80-CV-318

Appearances:

O'Connell and Wolfe, Attorneys for Plaintiff, Ten Healy Avenue, Plattsburgh, New York 12901.

Of Counsel: J. Byron O'Connell, Esq.

Thomas A. Robinson, Esq., Corporation Counsel, Attorney for Defendant, 55 Court Street, Plattsburgh, New York.

Memorandum Decision and Order, U.S. District Court for Northern District of New York, July 18, 1980

NEAL P. MCCURN, D. J.:

In this civil rights action brought against the City of Plattsburgh pursuant to 42 U.S.C. §1983,[1] plaintiff seeks a declaration from the Court that Article 2 of the Eminent Domain Procedure Law ("EDPL") of the State of New York is unconstitutional. In addition, plaintiff requests that the defendant be enjoined from taking any actions which would further impair its rights in a private road owned by it and previously taken by the defendant City in accordance with the challenged procedure.

The action is presently before the Court on plaintiff's motion for a preliminary injunction. Defendant, in opposing the motion has raised a question as to whether the Court should assume jurisdiction over this lawsuit in light of a previous State Court proceeding between the parties in which plaintiff initially challenged the constitutionality of the EDPL. Although defendant failed to bring a formal motion to dismiss the complaint, the Court in consideration of the accepted principles of federal-state comity, informed the parties at oral argument on the preliminary injunction motion that the question of whether the Court should assume jurisdiction in this case would be decided prior to a determination of plaintiff's motion. Both

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[1]Plaintiff also alleges that this action falls under 42 U.S.C. §1981. However, that position is clearly erroneous as there has been no claim made of racial discrimination as required under that provision. See *Runyon v. McCrary*, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976).

parties were given the opportunity to submit additional affidavits and legal memoranda on the jurisdictional issue.[2]

Background

Plaintiff is the owner of what has been described alternately as a private road and a driveway, located in the City of Plattsburgh, New York. The road was condemned by the defendant City in order to facilitate the development of six privately owned building lots located at its northern terminus.

The City, in accordance with the procedures set forth in Article 2 of the EDPL (§§201-208), presented its plan for the establishment of a water line and vehicular access to the areas to be developed at a public hearing. (EDPL §203). Subsequent to the hearing, findings and a determination allowing the project were published in accordance with EDPL §204. Plaintiff, claiming that the taking of its property was not for a public purpose but for the benefit of the private builders who own the lots to be developed, sought review of the findings and determination in the Appellate Division of the Supreme Court of the State of New York, Third Department, pursuant to the judicial review provision at EDPL §207(A).[3]

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[2]The Court also informed the parties that if a decision to assume jurisdiction was made that plaintiff would be given an opportunity for a hearing on the question of irreparable injury with regard to its application for preliminary relief. Notice of the filing of the action has been given to the New York State Attorney General in accordance with the requirements of 28 U.S.C. §2403(b).

[3]Section 207(A) provides in pertinent part that: (A)Any person or persons jointly or severally, aggrieved by the condemnor's determination and findings made pursuant to this article may seek judicial review thereof by the appellate division of the supreme court . . . .

Memorandum Decision and Order, U.S. District Court for Northern District of New York, July 18, 1980

The Appellate Division, in a decision dated December 20, 1979, confirmed the determination finding that "[t]he acquisition of land for a street and water system is a constitutionally permissible taking for a public purpose." Obviously dissatisfied with the determination, plaintiff, on January 3, 1980, moved for reargument, challenging for the first time the constitutionality of Article 2 of the EDPL, as in violation of the Fourteenth Amendment to the United States Constitution and Article I, §§6 and 7 of the New York State Constitution.

According to the parties to this action plaintiff's motion for reargument was denied by the Appellate Division.[4] Plaintiff filed a notice of appeal on January 24, 1980, asserting entitlement to an appeal as a matter of right pursuant to EDPL §§207 and 208.[5] In a statement filed pursuant to section 500.2 of the Rules of the Court of Appeals, plaintiff at paragraph "9" asserted that the EDPL is unconstitutional and confirmed that notice of the constitutional challenge had been given in writing to the Attorney General for the State of New York.[6]

[4]Although the papers submitted to the Court in this action do not include an order of the Appellate Division specifically denying reargument, the parties agree that such action was taken by the Court.

[5]In an affidavit submitted by the defendant, the Mayor of Plattsburgh stated that the notice of appeal to the Court of Appeals was filed before a determination had been made on the reargument motion. It is unclear from the papers whether that is in fact so. However, it is clear that plaintiff did raise the constitutionality argument in papers submitted to the Court of Appeals.

[6]Section 500.2 sets forth the Court rule for the filing and service of an appellant's jurisdictional statement. The section provides in part that:

Where a party will assert that a statute is unconstitutional notice of this assertion shall be given to the Attorney General in writing at the time of filing this jurisdictional statement and a certification to such effect shall be included in this statement.

Memorandum Decision and Order, U.S. District Court for Northern District of New York, July 18, 1980

The City of Plattsburgh moved to dismiss the appeal and by order dated March 20, 1980, the Court of Appeals granted the motion "upon the ground that no substantial constitutional question is directly involved." Plaintiff did not seek an appeal to the Court of Appeals by permission pursuant to New York CPLR §5602, nor did he seek review of the State action in the United States Supreme Court. Rather, plaintiff abandoned the State action and brought this action in federal district court under §1983.

Defendant, as previously indicated, assumes the position that this lawsuit must be dismissed on the grounds of *res judicata,* collateral estoppel and comity, arguing that the plaintiff's constitutional claim was raised and decided by the State Courts in the review proceeding brought pursuant to EDPL §207(A). Plaintiff, on the other hand, claims that the Appellate Division by denying reargument and the Court of Appeals by dismissing plaintiff's appeal, failed to decide the constitutional issues raised by it in those Courts. Thus, according to plaintiff, it should now be allowed to raise the constitutional claim anew in this Court. This Court disagrees and for the reasons discussed below dismisses the plaintiff's complaint on the grounds of *res judicata,* collateral estoppel and the principles of federal-state comity.

Discussion

Under the traditional doctrine of *res judicata:*

> a valid final judgment on the merits operates to bind the parties both as to the issues actually litigated and determined in the first action and as to

> those issues which might have been, but were not actually raised and decided in that first action.

Ornstein v. Regan, 574 F.2d 115, 117 (2d Cir. 1978) citing *Saylor v. Lindsley,* 391 F.2d 965, 968 (2d Cir. 1968). Although the Second Circuit has adopted a policy precluding the application of the *res judicata* doctrine in civil rights cases as to constitutional issues which might have been but were not raised and litigated in an earlier State Court proceeding, *Tomanio v. Board of Regents,* 603 F.2d 255, 258 (2d Cir. 1979), rev'd on other grounds U.S. , 48 U.S.L.W. 4556 (May 19, 1980); *Ornstein v. Regan, supra,* 574 F.2d at 117; *Lombard v. Board of Education,* 502 F.2d 631, 635-37 (2d Cir. 1974), *cert. denied* 420 U.S. 976, 95 S.Ct. 1400, 43 L.Ed.2d 656 (1975), decisions on the issue, "have rather clearly established that where a constitutional issue has been actually raised and determined in the State Court and was necessary to that decision, it may not be relitigated in a §1983 action." *Dieffenbach v. Attorney General of Vermont,* 604 F.2d 187, 198 (2d Cir. 1979). See also *Winters v. Lavine,* 574 F.2d 46 (2d Cir. 1978); *Ellentuck v. Klein,* 570 F.2d 414 (2d Cir. 1978); *Turco v. Monroe County Bar Ass'n.,* 554 F.2d 515 (2d Cir. 1977), *cert. denied* 434 U.S. 834, 98 S.Ct. 122, 54 L.Ed.2d 95 (1977).[7]

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[7]The cases addressing the issue have been decided through the application of both *res judicata* and collateral estoppel. Collateral estoppel precludes the relitigation only of issues which were raised and determined in the first action against the party raising them in the second action and which were necessary to the prior decision. As pointed out by the Court in *Winters v. Lavine, supra,* 574 F.2d at 57, it is sometimes easier to analyze a case like the present one as involving collateral estoppel rather than the modified *res judicata* principles applied to §1983 civil rights cases since it avoids the necessity of determining whether the cause of action in the second action is the same as that in the first as required for the application of *res judicata* but not collateral estoppel.

Memorandum Decision and Order, U.S. District Court for Northern District of New York, July 18, 1980

Plaintiff does not deny raising the constitutional claims presently before this Court in the prior State Court proceeding. However, plaintiff asks this Court to interpret the Appellate Division's silence on the constitutionality issue raised in the motion to reargue, and the Court of Appeal's dismissal of its appeal, as a failure on the part of those Courts to rule up on the constitutionality of Article 2 of the EDPL.

The Court does not doubt that a determination of the effect of the prior State Court litigation would be much simpler had the plaintiff sought a declaration as to the constitutionality of Article 2 of the EDPL from the outset of the State proceedings and had the State Courts addressed the issue of constitutionality head on.[4] Unfortunately, that is not the case. Nonetheless, this Court cannot view the silence of the State Courts with regard to the constitutional challenge as a failure on their part to address and decide upon the constitutionality of Article 2 of the EDPL. See *Winters v. Lavine, supra,* 574 F.2d at 61; *Lecci v. Cahn,* 493 F.2d 826, 830 (2d Cir. 1974); *Tang v. Appellate Division,* 487 F.2d 138, 141 n.2 (2d Cir. 1973), *cert. denied,* 416 U.S. 906, 94 S.Ct. 1611, 40 L.Ed.2d 111 (1974).

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[4]The scope of review available in the Appellate Division of the State Supreme Court under the EDPL is defined at §207 of the Law and includes a review of whether "the proceeding was in conformity with the federal and state constitutions." It would appear that the plaintiff's constitutional challenge would fall within that subsection.

In any event, the New York Court of Appeals, while recognizing that constitutional challenges should as a rule be brought by way of a declaratory judgment action, has allowed the determination of constitutional issues raised in other types of actions where the necessary parties were before the Court and the constitutional matter had been briefed by the parties. *Kovarsky v. Housing and Development Adm.,* 31 N.Y.2d 184, 335 N.Y.S.2d 383, 286 N.E.2d 882 (1972).

Memorandum Decision and Order, U.S. District Court for Northern District of New York, July 18, 1980

The silence of the Appellate Division on plaintiff's constitutional argument as contained in its motion to reargue is immaterial to the determination of whether the issue was decided by the Court. The constitutionality of Article 2 of the EDPL was distinctly challenged in the papers submitted to the Court by plaintiff on its motion to reargue. Once the constitutional challenge to the law under which the taking then under review by the Court had been accomplished had been placed before the Court, determination by that Court of the constitutionality of the law was absolutely necessary to an affirmance of the taking under it.

The plaintiff's constitutional challenge as previously discussed was also clearly presented to the Court of Appeals which ultimately dismissed the appeal upon the ground that no substantial constitutional question was directly involved. The Second Circuit had previously instructed that "a dismissal by the New York Court of Appeals for want of a substantial constitutional question is 'tantamount to a dismissal of the constitutional issues on the merits.' *Turco v. Monroe County Bar Ass'n.* [*supra,* 554 F.2d at 521]." *Ellentuck v. Klein, supra,* 570 F.2d at 422.'

'The Second Circuit in *Winters v. Lavine, supra,* 547 F.2d at 61 suggested that the New York Court of Appeals often dismisses appeals for lack of a substantial constitutional issue directly involved in cases in which the decision of the lower court could have been based on alternative grounds, one of which did not raise constitutional issues, and each of which was sufficient to support a judgment. In such a case, the appellant has the burden of demonstrating to the Court that the construction of the constitution was necessarily involved in the decision below. *Haydorn v. Carroll,* 225 N.Y. 84, 88, 121 N.E. 463 (1918).

The present case does not fall within that category since a determination with regard to plaintiff's constitutional claim was clearly necessary to an affirmance of the taking under the challenged law.

Memorandum Decision and Order, U.S. District Court for Northern District of New York, July 18, 1980

The law is well settled that "[f]ederal courts do not sit to review determinations of state courts' [*Mitchell v. National Broadcasting Co.*, 553 F.2d 265, 273 (2d Cir. 1977)], whose judges are as beholden to the Constitution as are we, as federal judges." *Ellentuck v. Klein, supra,* 570 F.2d at 425. A determination by this Court that the New York State Courts ignored the challenge to the constitutionality of Article 2 of the EDPL and went on to uphold a condemnation completed in accordance with the procedures would be to attribute to those Courts a failure to abide by that duty. There is simply no basis for reaching such a startling conclusion.

Since the plaintiff's challenge to the constitutionality of Article 2 of the EDPL was raised and necessarily decided in the State Courts of New York State in a prior proceeding involving the same parties, and since the plaintiff failed to seek review in the United States Supreme Court, this Court is precluded from deciding the question anew.[10] Therefore, for the reasons discussed above, the plaintiff's complaint is hereby dismissed.

It is so ordered.

Dated: Syracuse, New York
July 18, 1980

NEAL P. McCURN
U.S. District Judge

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[10]Although the Court has based its decision primarily on the principles of *res judicata,* collateral estoppel and federal-state comity, the same result would have been reached through the application of 28 U.S.C. §1738 which obligates federal courts to give full faith and credit to judgments entered by state courts of competent jurisdiction.

Appellate Division Order, February 25, 1980.

At a Motion Term of the Appellate Division of the Supreme Court of the State of New York, in and for the Third Judicial Department, held at the Justice Building in the City of Albany, New York on the 14th day of January, 1980.

Present:

Hon. A. Franklin Mahoney,
Presiding Justice
Hon. Michael E. Sweeney
Hon. T. Paul Kane
Hon. Ellis J. Staley, Jr.
Hon. J. Clarence Herlihy,
Associate Justices.

STATE OF NEW YORK, SUPREME COURT,

APPELLATE DIVISION—THIRD DEPARTMENT.

IN THE MATTER

OF

TERRACE WEST, Inc.,

Petitioner,

against

CITY OF PLATTSBURGH,

Defendant.

Appellate Division Order, February 25, 1980

A motion having been made by Terrace West, Inc. at this term of court in the above entitled proceeding for an order granting permission to reargue the appeal; now, after reading and filing proof of due service of the notice of motion, the affidavit of J. Byron O'Connell, Esq. verified January 3, 1980 in support of the motion and the affidavit of Thomas A. Robinson, Esq., sworn to January 10, 1980 in opposition thereto, and the Court having rendered a decision on the 7th day of February, 1980, it is hereby

ORDERED that the motion for reargument be and the same hereby is denied, without costs.

Enter:

/s/ JOHN J. O'BRIEN
Clerk

Dated and Entered: February 25, 1980.
A True Copy:
JOHN J. O'BRIEN
Clerk

Appellate Division Decision, February 7, 1980.

SUPREME COURT,

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT.

February 7, 1980

IN THE MATTER

OF

TERRACE WEST, Inc.,

Petitioner,

v.

CITY OF PLATTSBURGH,

Respondent.

36591

Motion for reargument denied, without costs.

Mahoney, P.J., Sweeney, Kane, Staley, Jr. and Herlihy, JJ., concur.

Appellate Division Order, January 14, 1980.

At a Term of the Appellate Division of the State of New York held in and for the Third Judicial Department at the Justice Building in the City of Albany, New York commencing on the 13th day of November, 1979.

Present:

Hon. A. Franklin Mahoney
Presiding Justice
Hon. Michael E. Sweeney
Hon. T. Paul Kane
Hon. Ellis J. Staley, Jr.
Hon. J. Clarence Herlihy
Associate Justices

STATE OF NEW YORK, SUPREME COURT,

APPELLATE DIVISION—THIRD DEPARTMENT.

IN THE MATTER
OF
TERRACE WEST, Inc.,
Petitioner,

against

CITY OF PLATTSBURGH,
Defendant.

Appellate Division Order, January 14, 1980

The above named petitioner having instituted a proceeding in this court pursuant to Section 207 (subd. [A]) of the Eminent Domain Procedure Law for a review of the determination and findings of the City of Plattsburgh relative to the public need for and environmental and other effect of the Sandra Avenue Improvement Project;

Now, on reading and filing the notice of motion and petition sworn to October 16, 1979 and the answer of the respondent and answering affidavit of John L. Ianelli sworn to October 26, 1979, and said proceeding having been presented during the above stated term by O'Connell & Wolfe, Esqs., of counsel for petitioner, and by Thomas A. Robinson, Esq., of counsel for respondent City of Plattsburgh, and after due deliberation, the Court having rendered a decision on the 20th day of December, 1979, it is hereby

ORDERED that the determination be confirmed and the petition dismissed with costs.

Enter:

/s/ JOHN J. O'BRIEN
Clerk

Dated and Entered: January 14, 1980.
A True Copy:
JOHN J. O'BRIEN
Clerk

Appellate Division Decision, December 20, 1979.

SUPREME COURT,

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT.

December 20, 1979 36591

IN THE MATTER

OF

TERRACE WEST, Inc.,

Petitioner,

v.

CITY OF PLATTSBURGH,

Respondent.

Proceeding instituted in this court, pursuant to section 207 (subd. [A]) of the Eminent Domain Procedure Law, to review the Determination and Findings of the City of Plattsburgh relative to the public need for, and environmental and other effect of the Sandra Avenue Improvement Project.

At issue in this proceeding is whether the proposed taking of a paved driveway owned by petitioner to facilitate the development of six privately owned building lots at the

northern terminus of that driveway is for a public or private use. At the required public hearing, the City of Plattsburgh presented its plan for the establishment of a water line and vehicular access to the area to be developed. Following the hearing, findings and a determination providing for such a project were duly published (EDPL, §§ 201-204). It is petitioner's contention, upon review of those findings and determination, that the taking of this property is only for the benefit of private builders who own the lots to be developed (EDPL, §207).

The acquisition of land for a street and water system is a constitutionally permissible taking for a public purpose (*Denihan Enterprises, Inc. v. O'Dwyer*, 302 N.Y. 451; *Evans v. State of New York*, 34 A.D. 2d 1007, affd. 28 N. Y. 2d 844). The fact that incidental private profit may accrue is insufficient to defeat the condemnation (*Matter of Murray v. LaGuardia*, 291 N.Y. 320, cert. den. 321 U.S. 771).

Determination confirmed, and petition dismissed, with costs.

Mahoney, P.J., Sweeney, Kane, Staley, Jr., and Herlihy, JJ., concur.

Minutes of Public Hearing.

MINUTES of a PUBLIC HEARING held in the Common Council Chambers, City Hall, Plattsburgh, New York, *on July 26, 1979 at 6:00 P.M. in connection with the Sandra Avenue Improvement Project.*

PRESENT: Mayor Ianelli, Aldermen Stewart, Baughn, LePage, Blumette, Ryder and Poitras.

ABSENT:

Mayor: This is a public hearing on the Sandra Avenue Improvement Project and this covers the connecting of a public street with Sandra Avenue to provide for the extension of water lines and servicing the area. The Sandra Avenue improvement project will be located within the following geographical boundaries.

ALL that certain parcel of land, situate in the City of Plattsburgh, County of Clinton, State of New York, bounded and described as follows: Beginning at a point, which point is in the westerly bound of Cogan Avenue and is 400 feet southerly of the south bound of Cornelia Street, and running thence in a westerly direction along the south bound of lands owned by Dorothy Cogan McDonough a distance of approximately 308 feet, to a point, which point is the intersection determined by the continuation of the westerly boundary line of proposed Sandra Avenue; thence southerly along the extended west bound of proposed Sandra Avenue a distance of 67 feet, more or less, to a point which is the northwest corner of Lot #27 as shown on the Sandra Avenue Subdivision map #SC-377 drawn by Joseph J. Martina, P.E., L.S.; thence easterly along a line 66 feet distant from and parallel with the

south bound of said Dorothy Cogan McDonough property a distance of 308.86 feet to an iron pipe set in the west bound of Cogan Avenue; thence northerly a distance of 66 feet to the place of beginning.

If there is anyone that has a statement to make to the Council on this public hearing, we will entertain it now. We do have one written statement that came in Gentlemen, and I think I will read it now for the Minutes, and I'll pass you each a copy. This statement is from Louis E. Wolfe, President of Terrace West, Inc.

"7/26/79
MEMO:

FROM: Louis E. Wolfe, President
Terrace West, Inc.

TO: The Mayor and Aldermen of the City of Plattsburgh

I do not believe that the condemnation of the property running in a general westerly direction from Cogan Avenue to a point at the Western intersecting line of Sandra Avenue is for a public purpose. My reasons for stating this are as follows:

That when the predecessors to the present owners attempted to have Sandra Avenue accepted as a public street, they approached the City and went before the Planning Board and were told that it could not be accepted as a public street until the acquisition of the Terrace West Driveway, as it is so called, was made. The Planning Board further elaborated that this would prevent another

dead end street. Notwithstanding that, the City went ahead and permitted the present owners to go ahead and develop Sandra Avenue to a point at least 750 ft. northerly from its intersecting bounds with Park Avenue South. Prior to this, the length of the dead end street, upon my information, was 500 ft. In any event, the permitted development on Sandra Avenue which has been accepted, to my understanding, as a public street, notwithstanding the Planning Department's recommendation, has been to a length of 750 feet northerly from Park Avenue South. There are many dead end streets in the City of Plattsburgh. If the City has permitted the builders to go ahead and construct this street, knowing that it was a dead end street when they permitted the construction of homes on it, it is no different than they have done in many other instances where there are dead end streets. There is no compelling reason why this is in the public interest to have this street connected with the Terrace West driveway, so called. The only interest, really, that would be served would be the development of our additional lots by the owners of the property that developed Sandra Avenue to the point where it now is. In other words, what is being sought to be done here is to take private property owned by Terrace West, Inc. to benefit private builders who own Sandra Avenue property. This is not in the public interest but only in the interest of those developers.

Additionally, the whole situtation was created by the City favoring those developers over the previous owners of the property, who had attempted to do the very same thing that is develop the property up to a distance of 500 or 750 ft., but were turned down by the City because it did not meet the Planning Department requirements. The City has fought, and has in fact, overrode the Planning Department recommendations and has permitted the present

development. They now seek to take our property for the benefit of these private developers. I think that they have indulged these private developers enough and they should not, under the guise of a public purpose or benefit, take our property. I believe that the condemnation proceeding is purely for the benefit of a private purpose and not a public one."

I am probably remiss in not asking Mr. Miller to provide us with a description of the property prior to receiving remarks. Mr. Miller, could you give us a description of the property, for the record.

Mr. Miller: In addition to the legal description that was previously read, I have I believe, our best description. Basically, it is a parcel of land sixty six feet wide and varying in length between 310 feet on the southern boundary and 320 feet on the northern boundary; the length of the parcel being generally arranged in an east-west direction and it is approximately 400 feet from the southern boundary of Cornelia Street. I realize you may not be able to see these accurately from the rear, but basically, it lies in the westerly portion of the City.

Mr. Miller: Do you want to go into . . . .

Mayor: Could you give us some of the history as to how we got to this stage?

Mr. Miller: Let me just say this, and going beyond the description. The purpose of the proposed acquisition of this parcel is to provide access to Sandra Avenue, a street which has been subdivided, with the stipulation that access is to be provided at both ends for vehicular traffic and for the looping of the water lines. The length of the proposed subdivision or the subdivision that is involved in this acquisition is approximaty 110 feet from Park Avenue West

to Terrace West, so called. The use of Terrace West will not change. It presently is used as a vehicular access to the Terrace West Apartments. That will not be modified by this. There may be additional traffic; in fact, we propose additional traffic over this easterly portion of that area when it becomes a City street. Existing in this sixty six foot parcel is a sanitary sewer which is owned by the owners of the apartment and connects into the City sanitary sewer system on Cogan. There would be no change in the use of that. There would be no additions to it and there would be no modifications to it. The surface area would be modified to upgrade it to conditions of City streets, specifically the addition of curbs and pavement gravel for asphalt surface. The . . . . in addition to that, another significant feature would be other than adding the water line. . . . that is, a water line added from the end of Sandra Avenue to the existing one on Cogan. This would be what we call looping the water line. In other words, the water line would be connected at both ends of the street; that is a requirement of the Health Department and it's also for fire safety. The Health aspect is an 1100 foot dead end line large enough to carry fire flows, would end up with water that would become stagnant, and perhaps could become a health problem. This is the interest of the Health Department in that line. The interest of the Engineering Department is that by connecting these lines at both ends, you end up with a greater hydraulic capacity, which is significant for fire flows, also, in the event of a failure of force, then you have an alternate problem of service . . . water service to the area. And that is also our concern and interest in having the street connected at both ends; it's safety, and also convenience.

I would like to read some articles out of the Sub-Division Ordinance the City passed May, 1973 and which

we are currently operating under. I'm going to read Paragraph 5.2.6. The caption is Dead-End Streets.

"The creation of dead ends or looped residential streets will be encouraged wherever the board finds successful development will not interfere with the traffic circulation in the area. In the case of dead end streets, where needed or desirable, the Board may require the reservation of a 20-foot wide easement to provide for continuation of pedestrian traffic and utilities to the next street, in addition to the requirements of Article 5.3."

The next Paragraph I'd like to read is Article 5.2.7, Street Connections. "Subdivisions containing twenty (20) lots or more shall have at least two street connections with existing public streets, or streets shown on the Official Map, as such may exist or streets on an approved Subdivision Plat for which a bond has been filed."

At this point, I'd like to comment that there are twenty-five lots in this approved subdivision. Now the third and final paragraph I'd like to quote from of the Sub-Division Ordinance is 5.3.9, Dead End Streets (Cul-De-Sacs)

"Where dead-end streets are designed to be so permanently, they should, in general, not exceed 500 feet in length, and shall terminate in a circular turnaround having a minimum right-of-way radius of 50 feet and pavement radius of 40 feet. At the end of temporary dead-end streets a temporary turnaround with a pavement radius 40 feet shall be provided unless the Planning Board approves an alternate arrangement."

I cite those portions of the Sub Division Ordinance as considerations the Planning Board had to take into account for approval of the sub-division.

Moving on to other considerations. One of economics. For the full development of Sandra Avenue from Park

Avenue West to the end of the parcel which is the southerly boundary of Terrace West, a sixty-six foot width. With 25 lots as presently approved and for the value of the eleven lots that have been developed, the average of those assessed values is $64,900. each. Projecting that to the full 25 lot development, you have an extension of the value of $1,622,500 on the assessment. If you were to...and now we are getting into assumptions, but if you were to allow that...undeveloped, those lots would be worth $8,000.00 each; you would have a value of $2,000 in assessment or the proposed development would bring an increase in value of assessed property of $1,422,500. The City has invested in this development at present, or at the end of this construction season, approximately $35,000 in storm sewers and will have, when the full length of street is developed, an investment in pavement for the surfacing of approximately $16,000. That's a total of $51,000 on Sandra Avenue for the full 1100 feet. We have invested $2,250 in appraisals to establish the value of this parcel on Terrace West and I estimate that to bring it up to City standards, an additional investment of $14,000 would be required. It would be our maximum investment which would include other improvements in the general vicinity, but generally would be related to this acquisition. On the subject of economics, I asked the Assessor to first establish the value of the average lot developed in the subdivision to date...the eleven properties that have been developed...and that averages $64,900. If we talk in terms, as we may later, about the restriction on the last six lots that assessed value would be extended to $381,400.

The question of development of Terrace West as being an advantage to the developer of this subdivision and I have these comments to present.

1) There is an existing agreement that the developer will pay to the City the amount of $5,000. to defray the costs and that he would also install the required water line from the newly developed Sandra Avenue to the existing water line on Cogan Avenue, and I believe that would be approximately $2600. for a total cost to the developer of $7600. for improvements to this subdivision. WE have hired an appraisal of the value of this parcel, it is Northeast Appraisers, and the amount that they appraise the current value of this parcel to be is $3,700. That's available for inspection.

Concerning the social impact of this acquisition, we feel that they are essential to the safe and convenient access for the permanent residents that will occupy this street as a matter of good planning, and considering the impact... the present driveway services a total of 96 units in this apartment complex and, of course, the apartment complex is served by Healey Avenue as well as Terrace West. The addition here is twenty-five dwelling units at full development and of course, it would be served at two ends as well.

As far as technological change there is (inaudible) after the improvements are made in that the City street will be placed in existing driveway use to the same purpose. There will be no change in its use.

Present status of this situation is that the subdivision approval as granted by the Clinton County Health Department requires the looping of the water line. I believe that for adequate fire flows and good engineering practice that the water line is also necessary. As previously quoted, from subdivision ordinances, I believe it's clear that adequate service access is also required, as well as the specific requirements of the subdivision ordinance.

The impact on the present owner as we view it is that the present use that it puts this property to will be continued and that the detriment would be the possibility of additional traffic on this portion of the street. The City, in this proposal would acquire the parcel, improve it, maintain it, and in addition would acquire the existing sewer line and maintain that as a City sewer, although it would continue to serve the purpose it presently serves. The City would reimburse the owner for the appraised value of the property and in addition, the property would go off the tax rolls. So the impact on the present owner, at least in my view, is not severely adverse.

The history of the parcel, in general—in total, is basically. It was acquired by Messrs. Rothman & Feldman in 1957 and in 1959, and in 1970 it transferred this portion to Terrace West, Inc. and at the same time, transferred a 66 ft. wide by three hundred and fifty foot parcel, the portion of which we are discussing tonight. In 1971 the Rothman & Feldman Company presented to the Planning Board a request to subdivide this parcel here and the Planning Board at that time recommended that Terrace West could be deeded as a City Street to avoid a turnaround and to facilitate the flow of traffic. At that time no approval of the subdivision plan was made and in 1972 Rothman & Feldman again submitted plans for approval. The plans were reviewed and again, no approval was given. At that time they did show a connection but the plan was never approved. In July, 1976 the Planning Board started reviewing the plan presented by Mr. Barnett and the tentative approval of the subdivision with the provision Terrace West street be connected to the acquisition. In 1976 there was an extended amount of correspondence and it goes on at great length which is a matter of public record and I'd be

happy to go over it but I gather you'd rather not go through a lot of details.

Alderman Poitras: I'd just like to ask a question. In listening and recognizing the plan, this is nothing more to us right now that could be identified as a street, although its considered to be a Drive for Terrace West. Is that correct? But it's not a paved area that you would see for regular vehicular use in Plattsburgh.

Mayor: That's right.

Alderman Poitras: Do I make myself clear?

Mr. Miller: Yes, I understand what you're saying. Yes, it is a paved area.

Alderman Poitras: So it's not a piece of property that can be built on or anything else but it's a piece of property used as access and regress to the facilities that are erected there...but it's private.

Mr. Miller: Yes.

Alderman Poitras: And so it's no different than it would be if the city owned it, except that they would plow the snow, maintain the street, pave it, put in the curbs, streetlights. Now exactly...the Board of Health. Are they mandating that we do not allow a dead end street of this nature as it exists right now?

Mr. Miller: They're not saying that the street has to be connected. They're saying that the water line has to be.

Alderman Poitras: So without...(Inaudible) we can't comply with the mandate of the Board of Health. So that now we're in violation of a guideline or an ordinance or law set by the Board of Health. I don't think it really leaves us much of a choice. If we don't own it, then we're in violation of the Board of Health and if we own it, then we maintain it, pave it. I don't see personally any real detriment to anybody other than the people living in the area.

Alderman Poitras: Am I right?

Mr. Miller: I would share that view.

Alderman Poitras: So if I may ask one more question. What is before us to (inaudible) and we have...how long...to prepare your determination?

Corporation Counsel: You have three months to prepare your determination.

Alderman Poitras: If I may, Your Honor. May I be excused because I have another appointment.

Mayor: We have another public hearing but that's alright. You may be excused. Is there anyone that wishes to address the Council?

Woman: Is Terrace West in violation of the City Ordinance?

Mayor: Would you identify yourself please?

Woman: Lena Wytkowski.

Mayor: No they are not apparently in violation of the City ordinance.

Alderman Stewart: In regard to the street, as I was looking at the situation. The developer will pay the $5,000 and the water line will be connected to Cogan Avenue. What about the development of the street itself? In conjunction with other developments where they put in the curb and the sub base, before the area is turned over.

Mr. Miller: The development of surface improvements would be at taxpayer's expense.

Alderman Stewart: That would be the City's expense?

Mayor: How about the sub-base that is normally done by the developer?

Mr. Miller: That would be done by the...

Mayor: By the developer. We would put in the tar-mac.

Alderman Stewart: We would put in the tarmac but the developer...but the curbs would be put in by the developer?

Mr. Miller: That's not my understanding.

Mayor: What is the understanding?

Mr. Miller: That the City would put in the curbs.

Mayor: That we would put in the curbs? In this development?

Norman Dame: Not in this development; only in this particular street. Because it's not really part of this development on this particular 300 foot section.

Mayor: Then the regular laws don't apply...?

Mr. Miller: Pardon?

Mayor: The regular subdivision laws don't apply in this case?

Mr. Miller: Well, first of all, that's correct. The spelling out of the street improvements are not applicable to Terrace West, since they're not improving Terrace West. The City stipulated that the developer...the initial stipulation was that the developer purchase from another private party, a parcel of land and dedicate it to the City and in that stipulation there weren't any requirements for improvements and it got quite involved and it's now currently my understanding that the requirement is that they pay this money to the City which would defray the cost of the acquisition and perhaps, some of the cost of improving it. That's neither here or there...they are paying a specific amount and making a specific improvement outside the area they are subdividing.

Mayor: Well if we do acquire this piece of property, we're just talking about curbs ending at Sandra Avenue.

Mr. Miller: Yes.

Mayor: The subdivision law would only apply, or as much as we're applying of it, would end at Sandra Avenue, the northwestern end of Sandra Avenue.

Mr. Miller: Right. It is not mandatory that the curbs be placed but to make it a city street up to current standards,

we would ask that funds be made available for the development of the curbs. But, we've got a lot of streets without curbs. But I'm specifically saying I recommend curbs in this area.

Alderman LePage: You say that the City would have to own the property in order to loop the water line? I was just wondering if anyone had ever approached the present owner for an easement to put the water line down there. Do we have any past history or...?

Mr. Miller: Yes, There has been a great deal of...

Alderman LePage: Just moving the water line now.

Mr. Miller: We've talked about that.

Alderman LePage: And what were the results?

Mr. Miller: Unsuccessful negotiations and that's why we're in this condemnation proceeding. We've just not been able to come to a meeting of the minds between the two parties involved.

Alderman Stewart: To go back to my original question in regard to the particular piece of red area. The utilization of that piece of land is solely for the development of Sandra Avenue extension and realistically in approaches that we normally take for the development of the last six lots that has to be purchased and it's technically a part of the development and the purchase is for the utilization of the development of that area. And recognizing the financial straits the City finds itself in on limited construction expenses, I wonder...to go any farther than with the pavement is going to be a tax on the taxpayers just to do the paving in that particular area, let alone the grading. The surface that's there has to be torn up and a new sub-base has got to be put in and curbs have to go in for control of water in the streets and so it doesn't spill over on somebody else's property. It should be a part of the job,

because either we do it or they do it and evidently they haven't been able to do it but if they made the purchase themselves, they would have to do it before they could turn the street over to the city.

Mayor: I think this is why the developer has given the City $5,000.

Alderman Stewart: Well he'd still have to purchase the land plus do the upgrading if he had purchased it himself.

Mayor: It was my understanding that the developer was going to put the curbs in.

Norman Dame: I'm Norm Dame; I represent the developer. We sent a letter, sent to the Mayor and Common Council, a letter dated August 3, 1978 in which he agreed to reimburse in the amount of $5,000. to use for the expenses of acquiring the property and in addition to that to connect the water main to the northerly end of Sandra Avenue. That was the extent.

Alderman Stewart: But in relation to the true reality of the situation you...if you were to purchase the same in the development itself and it became a part of the development, in order to meet the subdivision development code you would have to bring it up to sub-base and add the curb and then we go in and pave. But you would have the purchase price, plus the fact that you've got to put in the water line, plus the fact that you'd have to put in the sub-base and the curbing.

Norman Dame: Well first of all let me give you a little history. When we originally submitted our subdivision plan it was to have a dead end street in the development and the plan showed and the City ultimately decided that they wanted to connect the streets and required that before this development could go beyond the twenty lots, that we would be required to somehow gain access to that area.

The purpose of this is to develop those additional six lots and that's going to mean a lot more money for the City. And when Mr. Wolfe said this was being done for private purposes he was wrong. This development is going to provide a substantial increase in taxes for the City and permit six additional families to live on that street and in addition provide access to those people who are already living there on those twenty lots, from Sandra Avenue to Cogan Avenue without having to turn around and go back over to the corner.

Now, even assuming no further development is done. I'm not sure the City wants to leave the situation as it is now; even if those additional lots are not developed. Because, you're going to end up with a dead end street which apparently you don't want. We don't have any objection to it, by the way. If you want to permit the development of those additional six lots and have a turnaround there, we have no objection to that . . . . . (inaudible) . . . $5,000. plus the cost of installing that water line. However, you have imposed the requirement and we are trying to comply, but I don't think you are going to be happy, even if those additional six lots are developed. I don't think you're going to be happy with the water line the way it is now.

Alderman Stewart: So to retrace the position. Originally a permit was granted to develop to the five hundred foot limit. Then an extension of two hundred and fifty feet was granted for a total of seven hundred and fifty feet.

Norman Dame: No, that's not quite true. Initially, as I recall, they gave us permission to develop just two lots on the corners on the two corners of Sandra and . . . . . .

Mayor: Mrs. Jackstadt, the Vice Chairman of the Planning Board is present and I'm sure she could . . . . .

Norman Dame: Yes, Yes. I'm sure she could answer that. And then there came a time when the City approved another twenty lots which would take you I don't know how far back and then said before they approved the development of the additional six there had to be some kind of access back there because of some regulations either that they had imposed or guidelines that they had. I don't know how hard and fast those guidelines are. I don't know whether its mandatory they have access to there.

Alderman Stewart: Well, to return back to the original point and I've got to go back to the Engineer. I think you made a statement that it would take about $14,000 to bring the access road up to standards. That would increase . . . . . that would be the curbs, the sub-base and the pavement.

Mr. Miller: Yes.

Alderman Stewart: And the street lighting.

Mr. Miller: You know we've got some problems with some other residents over here on Cogan and we've got that in there. So that the project is larger than just the minimum amount of work. A minimum would be to leave it as it is and with a patch over the water . . . .

Alderman Stewart: But it . . . . .

Mayor: Does that include . . . . . (inaudible) to improve the . . . . (inaudible)

Mr. Miller: Yes. We have some additional work within the general area . . . .

Alderman Stewart: And that's in there so the figure is inflated by a certain amount but the percentage . . . .

Mr. Miller: By about . . . . .

Alderman Stewart: So we'd be talking roughly, about $7,000. But in regard to that particular section in order to have a true development it has to done. And if any

developer were to take that to develop it themselves, they would have to pay the fee of purchase, whatever that would be negotiated, and then they'd have to do the water line and the street upgrading to the degree of the sub-base and the curbs, if that were a private development. Am I right? Under our present code—the subdivision law.

Mr. Miller: Well really, the subdivision ordinance doesn't address directly, the cost of development outside of the area to be subdivided. It indirectly addresses it in the paragraphs I cited before for access. It's then been our practice, at least in the last five years that I know of, that the Planning Board and the developer do negotiate off-site improvements that are to facilitate that development, but they're not hard and fast, as far as the rules and regulations.

Alderman Stewart: But in recognizing the financial aspects of the City of Plattsburgh and the problems that we've had in other sub developments, actually we're committing more into a particular area than actually would be the case if it were done privately.

Mr. Miller: Well I don't think there is a yes or no answer. I really don't.

Alderman Stewart: And that's something that we've been trying to avoid in the present budget years, is to stay with the minimum that we can. I have no objections to the upgrading of the street and the paving of it, but I'd like it at the conditions that it would normally be developed by the developer before we take it.

Norman Dame: Except Jack, we don't own that property.

Alderman Stewart: But you don't own any street. Once you've got it you turn the ownership back over to the City after you bring it up to grade. That's the way it's usually done.

Norman Dame: But if you own the property, and then you want it dedicated to the City then you're required to meet certain requirements. But we don't own it and any improvements you make are made prior to having it transferred to the City. So we don't have a responsibility to develop that at all . . . . to develop that street. Obviously, we'd like to do it because we'd like to move ahead . . . . . (inaudible). Incidentally, Mrs. . . . . .

Mayor: Is that from the Planning Board?

Norman Dame: This is an abstract apparently and there is an entry date here of March 7, 1977 with a letter from the City Engineer to the Common Council requesting the acquisition of Terrace West to provide (inaudible) being pursued by the City in 1969 . . . . (inaudible) to develop the first 750 feet of the street and no (inaudible) to the issue of the last eight lots until Terrace West were acquired by the City. So that comes in to March 1977 when they gave permission to the developers to develop the first twenty lots, they did indicate that they would acquire that street before they would develop the additional six or eight.

Mayor: Mrs. Jackstadt, is that a synopsis of the Planning Board . . . . .

Mrs. Jackstadt: Yes, Sally Carey . . . . .

Mayor: Could I have that copy for the record?

Mrs. Jackstadt: I think Mr. Miller . . . . .

Mr. Miller: Yes. Actually I did that and I have copies . . .

Norman Dame: And we did agree as I pointed out before to pay $5,000 toward the acquisition of that.

Alderman Stewart: I have no objection to that, and I understand the $5,000 commitment. The situation being though, that in order to develop those lots and to fulfill the requirements of the Health Department, the Fire Department and the Planning Board, the acquisition would

be necessary either by us or by you, for the street. And in order to purchase the street, and then the City take it over it has to be upgraded to City standards. I don't know if that street, paved the way it is, would withstand . . . . and I've been up through there . . . . would withstand any heavier traffic than it's got right now. It would all fall apart, probably. Because it's a substandard drive . . . it's just a drive now and it's going to become a street and you're going to be running equipment across it and plowing that and maintaining that and so on, so the street has to be upgraded to the specification of the City.

Norman Dame: You see, we're not going to acquire it, Jack. We had already attempted to do that without success. Initially, Louis Wolfe wanted $5,000 for the property and then in addition he wanted us to transfer to him a triangular parcel which would have ruined the last lot to the extreme northwest line . . . southwest line.

Alderman Stewart: Yes, I know that particular situation—I'm familiar with that.

Norman Dame: Then when negotiations on that failed and we offered to pay him $5,000 and transfer the lot . . . . transfer the triangular parcel to him . . . he then decided he wanted $10,000 and as Mr. Miller has told you, it has only been appraised at something in excess of $3,000 so as you can see, those negotiations failed. Now what's happened is the only way you can acquire the street is if the City wants it for public purposes. This is a public purpose. It serves Sandra Avenue up there . . . those twenty-five or twenty six lots here. We don't have any obligation to improve a City street and we're not going to acquire that property. The City is. Now, if I could make just another point too. When we were here in 1977 and had our discussions with the various members of the Common Council and the

Mayor at that time and the Corporation Counsel, it was decided that the City would acquire this property and they gave approval for us to develop the initial twenty lots and then gave us tentative approval to develop the additional six or eight after the City acquired the property.

Alderman Stewart: When you acquired the property. You were still in negotiations . . . you were still in the process . . . . the process of negotiations . . . . in 1977 for the acquiring of that . . . . .

Norman Dame: Yes. But then there came a time when the City decided that it would acquire the property by condemnation and the only reason you're here today is because it's now determined that this public hearing is necessary. But you have actually already made the decision to acquire the property and we paid you money pursuant to that decision and pursuant to that agreement and we agreed in addition as part of the bargain to install a city . . . . to install a water line.

Alderman Stewart: We didn't . . . . . let me correct something there. We didn't agree to acquire that property. We agreed to start the process. The agreement to acquire is still to come. In other words, we're at the point now we're looking at it.

Norman Dame: Well, I disagree . . . . .

Alderman Stewart: The final vote was yet to come.

Norman Dame: Well, I disagree . . . . .

Alderman Stewart: After the public hearing. We can't commit before we have our public hearing to get the basis of the information.

Mayor: At the time we passed the resolution, the public hearing was not a part of the law. Maybe Mr. Robinson can clear that up.

Corporation Counsel: The law requirements changed last year and that's why we are required to have a public

hearing. Basically, it eliminates or is intended to eliminate, the arguing of the question of necessity before the Court, but rather, to have it resolved by the public hearing and findings by the Council as to whether or not this is feasible and if it is determined yes or no, to go ahead. The status of the law, prior to that last year, was that the City would go ahead with condemnation proceedings; objections could be stated in Court rather than at this public hearing.

Norman Dame: I think if I understand it, and perhaps Tom has said it, it did adopt a resolution to acquire the property by condemnation and then after it did that some time later, a long time passed, and the law changed and that is why we are having this public hearing.

Mayor: We do have a resolution to that effect. While we're on that subject, to clear the record and to clear my own name if I may. Last year, Mr. Wolfe made the accusation to me publicly that when I was on the Council as an Alderman I voted against accepting the street and now I was showing favoritism to the developer trying to get it. And I have here a copy of the Minutes of the Regular Meeting of Council on July 9th, 1970 with a resolution by Alderman Branon seconded by Alderman Akey to accept that street. One provision on it was that final approval was subject to receiving a commitment from Mrs. McDonough in connection therewith, and I voted in favor of the resolution, not against it. It was passed by a 4-2 vote. Alderman Ryan and Alderman King voted in the negative. On July 30th, 1970 Mr. Wolfe appeared before the Council and said that he could not get the clearance from Mrs. McDonough and therefore requested his deed back. So just to clear my own name if I may while we're on that subject I'd like it entered into the record that I have voted since 1970 to accept that street.

Mayor: It has been an involved affair.

Alderman Ryder: Go ahead and ask him about the cost.

Alderman Blumette: George, what is the cost to the City for development of that piece of property. What would it cost the City?

Norman Dame: It was in your summary of costs.

Mr. Miller: Specifically, Terrace West?

Alderman Blumette: Yes.

Mr. Miller: Okay. I have, and incidentally, this is in the Capital Budget for this year, an estimate of $14,000 for improvements in this area that would be capitalized and paid for by tax dollars; the number includes a significant amount of work in the area that is not specifically in this parcel. In other words, we go down Cogan Avenue in both directions quite a ways because we have additional work as far as improvements for street resurfacing, and such. I didn't think of it as a separate cost for this specific parcel so I would have to say that I would think that approximately 50% of that amount would have to be put in here for curbs, gravel base . . . . As I say I'm not very accurate on that . . . . . I did look at this very quickly so my estimate is not anything that's going to be entirely . . . . . .

Mayor: Is there any other testimony?

Woman: How much would it reduce the value of the Terrace West property? How much taxes would be lost from making it more accessible?

Mr. Miller: The loss of tax revenue from Terrace West?

Woman: Yes.

Mr. Miller: It's approximately . . . . well, at our appraised value of $33,700, for easy calculations say at $10.00 per thousand, it would be 3.7 x 10 or approximately $37.00 per year. City property taxes at the rate of $10.00 per thousand, that rate is really . . . . .

Woman: Does Terrace West agree with your figures?

Mayor: That's something we will address later on . . . that's not up for this hearing. Mr. Dame, you had something further you wanted to add?

Norman Dame: I just wanted to ask George, what would the tax base increase be for the development?

Miller: In answering your question, I'd also like to make a comment but first let me answer the question. This is a memorandum given me by the Assessor at my request. The assessed value of the six remaining lots based upon the average of the eleven lots . . . the assessed value of the eleven lots that are currently developed in that subdivision, would be $64,900 per lot times 6 which would extend to $389,400, if that answers your question.

Norman Dame: Yes, it does. What is it in actual tax dollars, George.

Mr. Miller: Again, it's easy for us to calculate at $10.00 per thousand, it would be three thousand eight hundred and ninety four dollars. That's the property tax and does not include the school tax. And ten dollars is not the correct rate either, but I'm just using it, but I think it's approximate . . . . . I'd like to make a comment if I may concerning the emphasis that's been placed on the remaining lots. It is my impression from my recollection of reviews with the Planning Board that the intent originally to withhold approval on the lots was consistent with the subdivision ordinance and also gave the City administration a plan for leverage on the developer at that time who at that time to give him an incentive to make the improvements. That was the position prior to these other developments and I mention that now because I get the sense that we're now thinking that these six or eight lots...now six lots...are in question and I'd like to say the question is from my point of view, it's not whether or not those lots

should or should not be developed but I think the question is "How can we conclude the acquisition of our requirements to loop the water line and provide vehicular access?" I don't think we can stop in the middle and be successful. I think that point should be brought up.

Mayor: Is there any other testimony to come before the hearing.

Alderman LePage: I have one more question Your Honor. I was just wondering if the City would be liable for a lawsuit. Say it didn't jibe. Would the City be liable for a lawsuit if it didn't go through with this end of the agreement in acquiring the property?

Alderman LePage: He says we have an agreement and Jack says we've just started the process. I just want to get that straight in my head.

Corporation Counsel: I don't think I don't think we should discuss publicly in the presence of the prospective plaintiff's in the action . . . . .

Alderman LePage: Excuse me for asking.

Alderman Stewart: I'd like to know the answer to that before I make any decision, I know that.

Alderman Ryder: I would just like to point out something that Mr. Miller implied but didn't really say and that's that the acquisition of this particular piece of property and the fact that it would become a City street if that's what eventually happens would be to the betterment of the 94 residents that live in Terrace West also. I think that you feel that also, don't you? You didn't really say that but it would give the 94 people who live there in the apartments, double access to their property . . . . .

Mayor: Improved access.

Mr. Miller: Yes.

Woman: Isn't that a matter of opinion.

Mr. Miller: I think what I said was that there is no change in the use of the property contemplated by this acquisition.

Mayor: George, it doesn't have to go on the record . . . . . Is there anymore testimony to come before this hearing?

There being no further testimony, the meeting was adjourned.

JOHN L. IANELLI, Mayor

The foregoing Minutes of a Public Hearing of the City of Plattsburgh held on July 26, 1979 are hereby transmitted to the City Clerk for the filing thereof among the public records of the City Clerk's Office in accordance with Local Law No. 19 of 1942.

Dated: July 30, 1979

JOHN L. IANELLI, Mayor

Public Notice of Determination and Findings.

PUBLIC NOTICE

Pursuant to Eminent Domain Procedure Law, Section 201, on July 26, 1979, a hearing regarding the Sandra Avenue Improvement Project, a proposed public project, was held to inform the public and to review the public use to be served by the project and the impact of the project on the environment and the residents of the locality where the Sandra Avenue Project will be constructed.

On August 16, 1979, the condemnor, the City of Plattsburgh, New York, made its determination and findings based on the hearing. A copy of the determination and findings will be forwarded to any interested person without cost upon written application to the City Clerk, City of Plattsburgh, City Hall, Plattsburgh, New York 12901.

A synopsis of the determination and findings follows:

1. The City of Plattsburgh has determined and found:

a. The Sandra Avenue Project will provide access from Terrace West for vehicles and provide a water line to loop a city water line to provide a better flow.

b. The Sandra Avenue Project will be constructed in a parcel of land having dimensions of 308.86 feet by 66 feet west of Cogan Avenue and approximately 400 feet south of Cornelia Street, and avoid Sandra Avenue being a dead end street at its presently northerly terminus.

Public Notice of Determination and Findings

c. The Sandra Avenue Project will affect the environment and residents of the locality in the following manner: The effect on the environment will be minimal since no change in use is contemplated by the Project. The area sought to be condemned is presently used as a driveway to the Terrace West Apartments and as a public street it will be available for the same use. The use should result in an increase in traffic.

BY ORDER OF THE COMMON COUNCIL.

CITY OF PLATTSBURGH, NEW YORK
By: ALINE G. COTE
City Clerk

Determination and Findings.

DETERMINATION AND FINDINGS OF THE COMMON COUNCIL OF THE CITY OF PLATTSBURGH RELATIVE TO SANDRA AVENUE IMPROVEMENT PROJECT.

As a result of a public hearing held July 26, 1979, the Common Council of the City of Plattsburgh makes the following findings with respect to the Sandra Avenue Improvement Project:

The public use, benefit or purpose served by the proposed public project is to use a portion of the Terrace West driveway as a city street to provide access to Sandra Avenue for vehicles and water line. No change in present use is required. Existing traffic to Terrace West Apartments will be maintained. Existing Terrace West Apartments sanitary sewer lateral will remain in service "as is" with no added connections. The City will maintain a portion in the street after acquisition. The additional water line will provide a loop to Sandra Avenue for better flow.

The approximate location for the proposed project is a parcel 308.86'x66' west of Cogan Avenue approximately 400' south of Cornelia Street.

The reason for the selection of this location is the existence of Sandra Avenue without an outlet at its northerly terminus and to avoid Sandra Avenue being a dead end street at its northerly terminus. This will provide a convenient and necessary right of way to connect the northern end of the water line on the Sandra Avenue development to the existing water main in Cornelia Street providing for loop service to insure adequate fire flows and to prevent water stagnation in a dead end water line.

Determination and Findings

The general effect of the proposed project on the residents of the locality would be to provide access to Sandra Avenue at its northerly terminus and to provide a better water supply in the area. The effect on the environment would be minimal since no change in use is contemplated by the project. The area sought to be condemned is presently used as a driveway to the Terrace West apartments and as a public street will be available for the same use.

Other relevant factors are that the Subdivision Ordinance of the City of Plattsburgh requires subdivisions with 20 lots or more to have connections with existing public streets. The acquisition of the subject property will permit compliance with this requirement.

The use of the subject property for the public will have some impact upon the present owner in that there should be an increase in traffic. On the other hand, the City of Plattsburgh will have the duty of maintaining the street and existing sewer. The City will pay the owner for the property sought to be condemned and will lose tax revenue by devoting the subject property to public use.

The City's present investment in the Sandra Avenue Subdivision is the storm sewer and pavement is approximately $47,000.00. The developer has paid $5,000.00 toward the expense of the City and has agreed to pay the expenses of looping the water line to Cogan Avenue, placing gravel on the portion of the land sought to be condemned, and to install curbing on the southerly side of such property, all in accordance with the specifications of the City. The additional cost to the City to acquire the property and to make the necessary improvements should not exceed the amount received.

Determination and Findings

The full development of the subdivision would produce 25 lots with an anticipated increase in taxable value when residences of comparable quality are constructed of $1,622,500.00, as compared to an assessed value as undeveloped lots of $200,000.00, or an increase in assessed value of $1,422,500.00.

It is therefore determined by the Common Council of the City of Plattsburgh that the subject property should be acquired by the City of Plattsburgh for the purposes above stated.

Resolution.

OFFICE OF THE CITY CLERK
CITY HALL
Plattsburgh, New York 12901
Aline G. Cote
City Clerk
Area Code 518
563-7702

August 21, 1979

At a Regular Meeting of the Common Council of the City of Plattsburgh, N.Y., held August 16, 1979, the following resolution was adopted:

By Alderman Ryder; seconded by Alderman Poitras:

Whereas, the City of Plattsburgh conducted a public hearing on July 26, 1979 relative to Sandra Avenue Improvement Project, and

Whereas, the Common Council has determined the Public use, benefit, or purpose served by the proposed public project is to use a portion of the Terrace West driveway as a city street to provide access to Sandra Avenue for vehicles and water line, with no changes in present use required, and

Whereas, the reason for the selection of this location is the existence of Sandra Avenue without an outlet at its northerly terminus and to avoid Sandra Avenue being a dead end street at its northerly terminus, and

Whereas, the Subdivision Ordinance of the City of Plattsburgh requires subdivisions with 20 lots or more to

have connections with existing public streets and acquisition of the subject property will permit compliance with this requirement, and

Whereas, the City has invested $47,000 in the Sandra Avenue Subdivision storm sewer and pavement, and the developer has paid $5,000 toward the expense of the City and has agreed to pay the expenses of looping the water line to Cogan Avenue, placing gravel on the portion of the land sought to be condemned, and to install curbing on the southerly side of such property in accordance with City specifications, with additional cost to the City to acquire the property and make the necessary improvements not to exceed the amount received, now therefore be it

Resolved: That the City of Plattsburgh, in accordance with the findings of the Common Council does hereby agree to acquire the subject property for the purposes stated, and the findings of the Common Council are hereby adopted, further

Resolved: That the Corporation Counsel is hereby authorized and directed to proceed with the acquisition of the Terrace West/Sandra Avenue property under the provisions of the Eminent Domain Procedures Law, further

Resolved: That a copy of this resolution be furnished the Corporation Counsel for his information and files, and further, that a copy of this resolution be furnished the developers, George Barnett, Jr. and Harry Payea, Jr.

Resolution

On roll call, Aldermen Stewart, Baughn, LePage, Blumette, Ryder and Poitras voted in the affirmative; no one in the negative. CARRIED.

CERTIFIED A TRUE COPY

ALINE G. COTE
City Clerk

(Seal)

Minutes of Resolution.

1561 RM 8/16/79

Mayor: We have the findings for the property on Terrace West/Sandra Avenue from the Hearing that we had two to three weeks ago, July 26th. You have all your copies so I won't read the whole thing. Could I have a motion adopting this finding, or a resolution adopting these findings, I guess that's the proper term Mr. Robinson?

By Alderman Ryder; seconded by Alderman Poitras:

Whereas, The City of Plattsburgh conducted a public hearing on July 26, 1979 relative to Sandra Avenue Improvement Project, and

Whereas, The Common Council has determined the public use, benefit, or purpose served by the proposed public project is to use a portion of the Terrace West driveway as a city street to provide access to Sandra Avenue for vehicles and water line, with no changes in present use required, and

Whereas, the reason for the selection of this location is the existence of Sandra Avenue without an outlet at its northerly terminus and to avoid Sandra Avenue being a dead end street at its northerly terminus, and

Whereas, the Subdivision Ordinance of the City of Plattsburgh requires subdivisions with 20 lots or more to have connections with existing public streets and acquisition of the subject property will permit compliance with this requirement, and

Minutes of Resolution

Whereas, The City has invested $47,000 in the Sandra Avenue Subdivision storm sewer and pavement, and the developer has paid $5,000 toward the expense of the City and has agreed to pay the expenses of looping the water line to Cogan Avenue, placing gravel on the portion of the land sought to be condemned, and to install curbing on the southerly side of such property in accordance with City specifications, with additional cost to the City to acquire the property and make the necessary improvements not to exceed the amount received, now therefore be it

Resolved: That the City of Plattsburgh, in accordance with the findings of the Common Council does hereby agree to acquire the subject property for the purposes stated, and the findings of the Common Council are hereby adopted, further

Resolved: That the Corporation Counsel is hereby authorized and directed to proceed with the acquisition of the Terrace West/Sandra Avenue property under the provisions of the Eminent Domain Procedures Law, further

Resolved: That a copy of this resolution be furnished the Corporation Counsel for his information and files, and further, that a copy of this resolution be furnished the developers, George Barnett, Jr. and Harry Payea, Jr.

On the roll call, Aldermen Stewart, Baughn, LePage, Blumette, Ryder and Poitras voted in the affirmative; no one in the negative. CARRIED.

During the roll call, Alderman Stewart interjected the following remark.

Alderman Stewart: Yes, Your Honor. There is an agreement with the firm that they would bring that particular street up to city specifications?

Mayor: Yes. I should have read that letter; we did get a letter from them, George Barnett and Harry Payea, the developers of the property which reads:

500 Cornelia Street
Plattsburgh, New York 12901
August 13, 1979

Mayor John Ianelli & Common Council
City of Plattsburgh
City Hall
Plattsburgh, New York 12901

Re: Sandra Avenue Subdivision

Gentlemen:

In an effort to bring an extremely distasteful and aggravating situation to a conclusion; we hereby agree, in addition to the Five Thousand Dollars already paid to the City a year ago and committment to loop the water line from the end of our street across land of others to Cogan Avenue, to gravel that portion of the land presently owned by Terrace West and to be condemned by the City in accordance with the city specifications and install curbing on the south side of said property.

Sincerely,

(Sgd)
George M. Barnett
Harry J. Payea, Jr.

Office - Supreme Court, U.S.
FILED
NOV 22 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-717

IN THE

Supreme Court of the United States

October Term, 1982

TERRACE WEST, INC.,
Petitioner,

against

THE CITY OF PLATTSBURGH, NEW YORK,
Respondent,

and

THE STATE OF NEW YORK,
Intervenor.

ON APPEAL FROM THE APPELLATE DIVISION, THIRD DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

THOMAS A. ROBINSON
Corporation Counsel, Attorney for Respondent
44 Clinton Street
Plattsburgh, NY 12901
(518) 563-6070

Question Presented.

Do Articles 2 and 4 of the New York State Eminent Domain Procedure Law (EDPL), which provide that a condemnor shall conduct a public hearing to review the public use to be served by a proposed public project and for judicial review that a determined public use will be served by the proposed acquisition, violate the Due Process Clause of the United States Constitution?

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RULE OF THE SUPREME COURT OF THE UNITED STATES:

Rule 17 13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982.

TERRACE WEST, Inc.,

Petitioner,

against

THE CITY OF PLATTSBURGH, NEW YORK,

Respondent,

and

THE STATE OF NEW YORK,

Intervenor.

ON APPEAL FROM THE APPELLATE DIVISION, THIRD DEPARTMENT, OF THE SUPREME COURT OF THE STATE NEW YORK.

RESPONDENT'S BRIEF IN OPPOSITION.

Statement.

The petition of petitioner for a writ of certiorari contends that Articles 2 and 4 of the New York State Eminent

Domain Procedure Law are unconstitutional and deny petitioner due process under the Fourteenth Amendment of the United States Constitution. It is petitioner's contention that despite the public hearing and judicial review of the Determination and Findings pursuant to EDPL, §201, §203, and §204, there was no impartial hearing before an impartial tribunal or arbitrator and, therefore, it was denied due process. Further, that despite its resort to EDPL, §207, for judicial review by the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, petitioner asserts that such judicial review did not provide adequate due process with respect to whether the proposed taking would serve a public use.

Facts and Prior Proceedings.*

The respondent, City of Plattsburgh, New York, commenced a proceeding under the Eminent Domain Procedure Law (EDPL) of the State of New York to acquire, for use as a public street, a driveway owned by the petitioner, Terrace West, Inc. Following a public hearing, on notice as required by EDPL, the Common Council, the legislative body of the respondent City, made a determination and findings as to the public necessity for the project called Sandra Avenue Improvement Project (A58). Petitioner then sought judicial review of the determination and findings by the Appellate Division of the New York Supreme Court, Third Judicial Department. The Court confirmed, holding that the proposed taking was for a public purpose and dismissed the petition (73 A. D. 2d 763 [3d Dept. 1979]) (A29). Petitioner moved for reargument which was denied (A26). Petitioner appealed to the Court of Appeals of the State of New York. The Court of Appeals dismissed the appeal "upon the ground that no

*References are to pages of petitioner's petition for certiorari.

substantial constitutional question is directly involved" (49 N. Y. 2d 916 [1980]).

Terrace West, Inc., did not seek certiorari to the Supreme Court of the United States, but commenced an action in the United States District Court for the Northern District of New York. That action was dismissed by Judge McCurn in a memorandum decision (A15).

The respondent then commenced a proceeding under Article 4 of EDPL to file its acquisition map and vest title in the City of Plattsburgh, New York. This was granted by Special Term of the New York Supreme Court (A11).

On appeal to the Appellate Division, Third Judicial Department, the order was affirmed (A. D. 2d , 499 N. Y. S. 2d 343) (A8). Permission to appeal to the Court of Appeals was denied on September 8, 1982 (A1).

Constitutional Provisions and Statutes Involved.

United States Constitution, Fourteenth Amendment, Section 1:

> Section 1. Citizens of the United States.
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Eminent Domain Procedure Law:

§201. Public hearings

Except as provided herein, prior to acquisition, the condemnor, in order to inform the public and to review the public use to be served by a proposed public project and the impact on the environment and residents of the locality where such project will be constructed, shall conduct a public hearing in accordance with the provisions of this article at a location reasonably accessible to the property owners whose property might be acquired for such project.

§202. Notice

(A) Where a public hearing is required by this article the condemnor shall give notice to the public of the purpose, time and location of its hearing setting forth the proposed location of the public project including any proposed alternate locations, at least ten but no more than thirty days prior to such public hearing by causing such notice to be published in at least five successive issues of an official daily newspaper if there is one designated in the locality where the project will be situated and in at least five successive issues of a daily newspaper of general circulation in such locality.

(B) In the event that the only newspaper available in such locality is a weekly publication the above described notice shall be published in such newspaper in at least two successive issues.

(C) Failure to notify a person or persons entitled to notice under this section shall not be jurisdictional nor construed to affect the validity of any title acquired by a condemnor under this law.

§203. Conduct of the public hearing

At the public hearing the condemnor shall outline the purpose, proposed location or alternate locations of the public project and any other information it considers pertinent, including maps and property descriptions of the property to be acquired and adjacent parcels. Thereafter, any person in attendance shall be given a reasonable opportunity to present an oral or written statement and to submit other documents concerning the proposed public project. A record of the hearing shall be kept, including written statements submitted. The condemnor's copy of such record shall be available during normal business hours, at its principal and district offices to the public for examination without cost and shall be reproduced upon written request and payment of the cost thereof. Further adjourned hearings may be scheduled.

§204. Determination and findings

(A) The condemnor, within ninety days after the conclusion of the public hearings held pursuant to this article, shall make its determination and findings concerning the proposed public project and shall publish a brief synopsis of such determination and findings in at least two successive issues of an official newspaper if there is one designated in the locality where the project will be situated and in at

least two successive issues of a newspaper of general circulation in such locality. The synopsis shall include those factors set forth in subdivision (B) herein, and shall also state that copies of the determination and findings will be forwarded upon written request without cost.

(B) The condemnor, in its determination and findings, shall specify, but shall not be limited to the following:

(1) the public use, benefit or purpose to be served by the proposed public project;

(2) the approximate location for the proposed public project and the reasons for the selection of that location;

(3) the general effect of the proposed project on the environment and residents of the locality;

(4) such other factors as it considers relevant.

§207. Judicial Review

(A) Any person or persons jointly or severally, aggrieved by the condemnor's determination and findings made pursuant to this article, may seek judicial review thereof by the appellate division of the supreme court, in the judicial department embracing the county wherein the proposed facility is located by the filing of a petition in such court within thirty days after the condemnor's completion of its publication of its determination and findings pursuant to section two hundred four herein. Such petition shall be accompanied by proof

of service of a demand on the condemnor to file with said court a copy of a written transcript of the record of the proceeding before it, and a copy of its determination and findings. Upon receipt of such petition and demand, the condemnor shall forthwith deliver to the court a copy of the record and a copy of its determination and findings. The proceeding shall be heard on the record without requirement of reproduction. If such proposed public improvement is located in more than one judicial department such proceeding may be brought in any one, but only one of such departments and all such proceedings with relation to any single public project shall be consolidated with the first filed.

(B) The jurisdiction of the appellate division of the supreme court shall be exclusive and its judgment and order shall be final subject to review by the court of appeals in the same manner and form and with the same effect as provided for appeals in a special proceeding. All such proceedings shall be heard and determined by the appellate division of the supreme court, and by the court of appeals, as expeditiously as possible and with lawful preference over other matters.

(C) The court shall either confirm or reject the condemnor's determination and findings. The scope of review shall be limited to whether:

(1) the proceeding was in conformity with the federal and state constitutions,

(2) the proposed acquisition is within the condemnor's statutory jurisdiction or authority,

(3) the condemnor's determination and findings were made in accordance with procedures set forth in this article, including, where applicable, a determination that an acquisition is exempt from compliance with this article, and

(4) a public use will be served by the proposed acquisition.

§402. Filing of acquisition maps; vesting

* * *

(B) In all acquisitions under supreme court jurisdiction provided in subdivision (B) of section five hundred one herein, the condemnor, prior to filing an acquisition map within the time prescribed by section four hundred one, shall obtain an order to acquire such property and for permission to file such map by presentation of a verified petition to the supreme court in the judicial district where the real property to be acquired or any part thereof, is situated, in accordance with the following procedure:

(1) The condemnor shall cause to be filed in the office of the clerk of each county where the real property to be acquired or any part thereof is situated, a notice of the pendency of such proceeding. Such notice shall briefly state the object of the proceeding and shall contain a general description by metes and bounds or by section, block and lot number of the real property to be acquired thereby. It shall also state the names of such of the reputed condemnees of such real property as may

be known to the condemnor, and in case any of the condemnees are unknown, a statement to that effect shall be made in such notice.

(2) The condemnor shall, at least twenty days prior to the return date of the petition, serve by registered or certified mail return receipt requested, a notice of the time, place and object of the proceeding upon the last known owner or owners of record of the property to be acquired, as the same appears from the record of the tax assessor of the district wherein such parcel or parcels are located. Said notice shall contain a copy of that portion of the proposed acquisition map affecting the owner's property. At least ten but not more than thirty days before the return date of the application, the condemnor shall also cause a copy of a diagram or representation of the acquisition map showing the perimeters to be acquired and a notice generally describing the property to be acquired by metes and bounds or by section, block and lot numbers, to be advertised by publishing in at least ten successive issues of an official newspaper if there is one designated in the locality where the property is situated, and in at least ten successive issues of a newspaper of general circulation in such locality. In the event that the only newspaper available in such locality is a weekly publication the above described notice shall be published in such newspaper in at least three successive issues. Where the condemnor has conducted an article two public hearing or when the condemnor is exempt from compliance with article two pursuant to section two hundred six the condemnor may dispense with the requirement of publication in ten successive issues of a

newspaper of general circulation. Where practicable, the condemnor shall cause copies of such notice in the form of handbills to be posted for the same period in at least three conspicuous places, upon or near such real property. The inadvertent failure to notify any condemnee, whether of record or not, will not invalidate any proceedings brought hereunder or any title acquired by the condemnor under this law.

(3) The condemnor shall present to the Court a petition verified by an authorized officer of the condemnor setting forth:

(a) a statement providing either the compliance with the requirements of article two of this law, including a copy of the condemnor's determination and findings or a statement providing the basis of exemption from article two;

(b) a copy of the proposed acquisition map to be filed and the names and places of residence of the owners of the property to be acquired;

(c) a description of the real property to be acquired and its location, either by metes and bounds of each individual parcel, or section, block and lot number, and by reference to the acquisition map and notice of pendency attached to the petition;

(d) the public use for which the property is required;

(e) a request that the court direct entry of an order authorizing the filing of the acquisition map

in the office of the appropriate county clerk or register and that upon such filing, title shall vest in the condemnor;

(f) if a non-governmental condemnor subject to the jurisdiction, supervision and regulation of the public service commission or the commissioner of transportation, it shall include in its petition for acquisition, notice that it shall deposit a bond or undertaking with the clerk of the court prior to vesting of title to the real property described in such petition in an amount to be fixed by the court on the return date of the petition. The court shall direct that the bond or undertaking will be applied in the amount necessary, for any default by the condemnor in the payment of all or part of the damages determined in the acquisition proceeding or the abandonment thereof.

The requirement for a bond or undertaking under this subdivision, may be waived by stipulation of the parties. If the amount deposited is insufficient to pay such damages and all costs and expenses awarded to a condemnee, judgment shall be entered against the condemnor for the deficiency, to be enforced and collected in the same manner as a judgment in the supreme court;

(g) if the property is to be used for the construction of a major utility transmission facility, as defined in section one hundred twenty of the public service law, or major steam electric generating facility as defined in section one hundred forty of such law with respect to which a certificate of environmental compatibility and public need has been

issued under such law, a statement that such certificate relating to such property has been issued and is in force.

(4) Upon the presentation of the petition and notice with proof of service thereof, an owner of the property may appear and interpose a verified answer, which must contain specific denial of each material allegation of the petition controverted by him, or of any knowledge or information thereof, sufficient to form a belief, or a statement of new matter constituting a defense to the proceeding.

(5) At the time and place mentioned in such notice, unless the court shall adjourn the application to a subsequent date, and in that event at the time and place to which the same may be adjourned, upon due proof of service of notice and upon filing of such petition and proof to its satisfaction that the procedural requirements of this law have been met, the court shall direct the immediate filing and entry of the order granting the petition, which order the condemnor shall file and enter together with the acquisition map, in the office of the county clerk or register in each county in which the real property or any part thereof is situated. Upon the filing of the order and the acquisition map, the acquisition of the property in such map shall be complete and title to such property shall then be vested in the condemnor.

• • •

Reasons for Denying the Writ.

The failure of petitioner to seek the writ of certiorari from this Court is adequately referred to in the memorandum decision of Judge McCurn (A19).

It is also respectfully suggested that the present petition for a writ of certiorari does not come within the types of reasons for exercising the Court's discretion to grant review on certiorari as provided in Rule 17 of the Rules of this Court.

Petitioner contends that the New York State Eminent Domain Procedure Law is unconstitutional in that it does not provide for a trial before a court on an adversary type basis of the issue of the necessity for the condemnation.

Petitioner cites no authority to support this contention. On the contrary, it is well settled that the question of need for a taking is for the Legislature and not for the Courts. *Bragg v. Weaver,* 251 U. S. 57; *People v. Adirondack Ry. Co.,* 176 U. S. 335; *Zember v. State of New York,* 5 Misc. 2d 216 (Ct. Cl. 1957).

In *County of Orange v. Public Serv. Comm.,* 39 A. D. 2d 311 (2d Dept. 1972), affd. 31 N. Y. 2d 843 (1973), the Court stated at pages 318-319:

> "It is the general rule that the question of need for a taking is for the Legislature, not the courts; that the courts cannot review the legislative determination on that point, and notice and a hearing on that question consequently are not essential to due process (see, e. g., *Bragg v. Weaver,* 251 U. S. 57, 58-59, 62; *Rindge Co. v. County of Los Angeles,*

262 U. S. 700, 708-709; *People v. Smith*, 21 N. Y. 595, 597-598; *Matter of Townsend*, 39 N. Y. 171, 174; 1 Nichols, Eminent Domain [3d ed.], §4.11, p. 540; 17 Carmody-Wait 2d, New York Practice, §108:13). Generally, it is only on the issues of fair compensation and public use for the taken property that property owners have a constitutional right to be heard, and the right to notice and a hearing on the issue of need for the taking exists only if granted by statute (see, e. g., *People v. Adirondack Ry. Co.*, 160 N. Y. 225, 238-239, affd. *sub nom. Adirondack Ry. Co. v. New York State*, 176 U. S. 335; *Fifth Avenue Coach Lines v. City of New York*, 11 N. Y. 2d 342, 347-348, *Rindge Co. v. County of Los Angeles, supra; Bragg v. Weaver, supra; Matter of Townsend, supra; People v. Smith, supra*). In light of these general principles, then, property owners do not appear to have been deprived of any constitutional right when in 1970 the Legislature took away their previous statutory right to litigate, in the condemnation proceeding, the question of need for a taking for a utility transmission line."

Article 5 of the Eminent Domain Procedure Law provides the right to a full trial in the matter of determining the compensation to which petitioner is entitled.

Articles 2 and 4 of the EDPL do not permit an arbitrary exercise of the power of condemnation and the authority of the State was not exerted in excess of petitioner's right to due process.

CONCLUSION.

For the reasons above stated, the petition for writ of certiorari should be denied.

Dated: Plattsburgh, New York
November 15, 1982

Respectfully submitted,

THOMAS A. ROBINSON
Corporation Counsel
Attorney for Respondent
44 Clinton Street
Plattsburgh, NY 12901
(518) 563-6070

82-717

Office - Supreme Court, U.S.
FILED
NOV 12 1982
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

October Term, 1982

TERRACE WEST, INC.,
Petitioner,

against

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Respondent,

and

THE STATE OF NEW YORK,
Intervenor.

ON APPEAL FROM THE APPELLATE DIVISION, THIRD DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

Respondent-Intervenor's Brief in Opposition

ROBERT ABRAMS
Attorney General of the State of New York, Attorney for Intervenor
The Capitol
Albany, NY 12224
(518) 474-8586

Dated: November 3, 1982

PETER H. SCHIFF
Acting Attorney in Chief
Appeals and Opinions

VERNON STUART
Principal Attorney
Of Counsel

Question Presented.

Whether Articles 2 and 4 of the New York State Eminent Domain Procedure Law (EDPL), which provide that a condemnor shall conduct a public hearing to review the public use to be served by a proposed public project and for judicial review that such a determined public use will be served by the proposed acquisition, violate the Due Process Clause of the United States Constitution?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982.

TERRACE WEST, Inc.,

Petitioner,

against

THE CITY OF PLATTSBURGH, NEW YORK,

Respondent,

and

THE STATE OF NEW YORK,

Intervenor.

ON APPEAL FROM THE APPELLATE DIVISION, THIRD DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK.

Respondent-Intervenor's Brief in Opposition.

Statement.

Petitioner asserts in its petition for a writ of certiorari that Articles 2 and 4 of the Eminent Domain Procedure Law are unconstitutional and denies it due process under the United States Constitution, Fourteenth Amendment. It contends that even though the condemnor, City of Plattsburgh, held a public hearing to inform the public and review the public use to be served by the property project pursuant to EDPL, § 201, conducted the public meeting pursuant to EDPL, § 203, and made a Determination and Findings as to the proposed project pursuant to EDPL, § 204, an impartial hearing was not held before an impartial arbitrator as to whether its property need be taken and, therefore, it was denied due process under the United States Constitution, Fourteenth Amendment. Petitioner concedes that EDPL, § 207 provides for a judicial review of the condemnor's Findings and Determinations as to whether a public use would be served by the proposed acquisition based upon the record made at the public hearing, but he contends that the judicial review is inadequate.

Facts and Prior Proceedings.*

The City of Plattsburgh instituted a proceeding under the Eminent Domain Procedure Law (EDPL) to acquire, for use as a public street, a private driveway owned by Terrace West, Inc. A public hearing was held as required by EDPL, Article 2, and thereafter the City Common Council made a Determination and Findings as to the public necessity for the project (A58). Terrace West, Inc. then challenged the City's Determination and Findings in the Appellate Division, Third Department. The Court confirmed the City's Determination and Findings (73 AD2d

*References are to pages of the petitioner's petition for certiorari.

763 [3d Dept, 1979]) and held that the taking was for a public purpose and dismissed the petition (A29).

Terrace West, Inc. thereafter made a motion for reargument to the Appellate Division which was denied (A26). Terrace West then appealed to the Court of Appeals. The Court of Appeals dismissed the appeal "upon the ground that no substantial constitutional question is directly involved" (49 NY2d 916 [1980]).

Terrace West did not seek certiorari to the United States Supreme Court but, instead, instituted an action in the Federal Court, Northern District. This action was dismissed pursuant to decision of the United States District Judge McCurn, holding that the issue having been decided by the Appellate Division and the Court of Appeals of the State of New York, the relitigation thereof was barred by the doctrines of *res judicata* and collateral estoppel (A15).

The City of Plattsburgh then commenced proceedings under Article 4 of the EDPL to acquire title to the property herein involved. This resulted in an order and judgment of the Supreme Court, Special Term, authorizing the filing of the acquisition map describing the property to be acquired by the City and vesting title thereto in it (A11).

The Appellate Division, Third Judicial Department, in 1982, affirmed the order permitting the City of Plattsburgh to file an acquisition map (____ AD2d ____, 499 NYS2d 343) (A8). Permission to appeal to the Court of Appeals was denied on September 8, 1982 (A1).

Statutes Involved.

The relevant United States constitutional provisions and State Statutes are attached hereto as Appendix A.

Reasons for Denying the Writ.

Terrace West, Inc. seeks a writ upon the grounds that Articles 2 and 4 of the Eminent Domain Procedure Law (EDPL) "are in violation of a landowner's, more specifically, in this instance, Terrace West, Inc.'s constitutionally guaranteed right to due process in actions involving a possible deprivation of property, under the Fourteenth Amendment." (16)

Petitioner contends, in essence, that the procedure provided in the EDPL for determination of the public necessity for a taking of private property is unconstitutional in that no formal adversary-type trial before a court is provided for, the issue being decided by the condemnor, after a public hearing, subject only to review by the courts based upon the record of the public hearing held. Neither case law, nor any other authority, is cited for such contention.

In *Zember v. State of New York,* 5 Misc 2d 216, 218 (Ct Cl, 1957), the court reviewed the theory of eminent domain and pointed out that a hearing is not needed:

> "The power of eminent domain is an inherent power in any sovereign. It is a characteristic and an attribute of sovereignty. Like the power of taxation and police power, the power of eminent domain exists as a necessity to effective government. The existence of the power does not depend upon constitutional provisions but rather, the power underlies the Constitution and exists simply because there is a sovereign power in existence. (*People v. Adirondack Ry. Co.,* 160 N. Y. 225, 236-237, affd. 176 U. S. 335.)

"The power has been exercised by the State of New York ever since the State came into existence yet such power was not even mentioned in the first Constitution of the State and under the present Constitution the power is referred to only by way of limitation on its exercise. In section 6 of article I of the Constitution the exercise of the power is limited by the restriction that no person may be deprived by his property without due process of law. In section 7 of article I of the Constitution the exercise of the power is limited by the restriction that private property may not be taken for public use without just compensation. In the exercise of the power of eminent domain due process in accordance with the constitutional guarantee does not grant to the property owner any right to be heard on the question of appropriation by the State unless some statute requires it. (*Matter of Village of Middletown*, 82 N. Y. 196, 201.) The right of the State to take possession of property and devote that property to public use in a summary manner without notice or hearing has long been sustained as not violating the constitutional requirements for due process of law. (*People v. Adirondack Ry. Co., supra*, pp. 238-241.)"

In *Brent v. Hoch*, 25 Misc 2d 1062 (Sup Ct, 1960), the court stated:

"The further objection that due process of law was wanting as no public hearing was held and no findings were made as to the taking is also insufficient. The right of eminent domain is inherent in the State; and the Federal and State Constitutions

merely require that the taking be for a public purpose and that there be the payment of just compensation in accordance with substantive and procedural due process of law. This means that after such taking the property owner shall be given reasonable notice and reasonable opportunity to be heard on the question of compensation and damages at some reasonable stage of the eminent domain proceeding. (*Bragg v. Weaver*, 251 U. S. 57, 62; *People v. Adirondack Ry. Co.*, 160 N. Y. 225, affd. 176 U. S. 335; 17 Carmody-Wait, New York Practice, § 8, pp. 151-152.) This requirement is satisfied by the hearing or trial on the issue of compensation and damages permitted in the Court of Claims, if no compromise as to the amount has been effected between the Commissioner and the owner (Mental Hygiene Law, § 46, subd. 13; Court of Claims Act, §§ 9, 10, 16, 20). Nor do the due process clauses require a public hearing or findings of fact when the State through a duly constituted State official exercises its right and power of eminent domain (*North Laramie Land Co. v. Hoffman*, 268 U. S. 276, 284, *supra; Bragg v. Weaver*, 251 U. S. 57, *supra; Matter of Public Serv. Comm.*, 217 N. Y. 61, 66, 67, *supra; People v. Adirondack Ry. Co.*, 160 N. Y. 225, affd 176 U. S. 335, *supra*)."

The law is well settled that, in eminent domain proceedings, there is no constitutional right to a trial on the issue of public necessity. *Fifth Ave. Coach Lines v. City of New York*, 11 NY2d 342, 348-349 (1962); *County of Orange v. Public Serv. Comm.*, 39 AD2d 311, 318-319 (2d Dept, 1972), affd 31 NY2d 843 (1973); *County of Broome v. Trustees of First Methodist Episcopal Church*, 37 AD2d 1036 (3d Dept, 1971).

In *County of Orange, supra,* the Court stated (39 AD2d at pp 318-319):

> "It is the general rule that *the question of need for a taking is for the Legislature, not the courts;* that the courts cannot review the legislative determination on that point, and notice and *a hearing on that question consequently are not essential to due process* (see, e.g., *Bragg v. Weaver,* 251 U. S. 57, 58-59, 62; *Rindge Co. v. County of Los Angeles,* 262 U. S. 700, 708-709; *People v. Smith,* 21 N. Y. 595, 597-598; *Matter of Townsend,* 39 N. Y. 171, 174; 1 Nichols, Eminent Domain [3d ed.], § 4.11, p. 540; 17 Carmody-Wait 2d, New York Practice, §108:13). Generally, it is only on the issues of fair compensation and public use for the taken property that property owners have a constitutional right to be heard, and *the right to notice and a hearing on the issue of need for the taking exists only if granted by statute* (see, e.g., *People v. Adirondack Ry. Co.,* 160 N. Y. 225, 238-239, affd. *sub nom Adirondack Ry. Co. v. New York State,* 176 U. S. 335; *Fifth Ave. Coach Lines v. City of New York,* 11 N. Y. 2d 342, 347-348; *Rindge Co. v. County of Los Angeles, supra; Bragg v. Weaver, supra; Matter of Townsend, supra; People v. Smith, supra*). In light of these general principles, then, property owners do not appear to have been deprived of any constitutional right when in 1970 the Legislature took away their previous statutory right to litigate, in the condemnation proceeding, the question of need for a taking for a utility transmission line." (Emphasis supplied.)

Articles 2 and 4 of the EDPL did not subject petitioner to an arbitrary exercise of the powers of government and

the State's authority was not exerted in excess of the petitioner's right to due process.

CONCLUSION.

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Dated: Albany, New York
November 3, 1982

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Intervenor

PETER H. SCHIFF
Acting Attorney in Chief
Appeals and Opinions

VERNON STUART
Principal Attorney
of Counsel

APPENDIX A.

Constitutional Provisions and Statutes Involved.

United States Constitution, Fourteenth Amendment, Section 1:

> Section 1. Citizens of the United States.
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Eminent Domain Procedure Law:

> §201. Public hearings
>
> Except as provided herein, prior to acquisition, the condemnor, in order to inform the public and to review the public use to be served by a proposed public project and the impact on the environment and residents of the locality where such project will be constructed, shall conduct a public hearing in accordance with the provisions of this article at a location reasonably accessible to the property owners whose property might be acquired for such project.

§202. Notice

(A) Where a public hearing is required by this article the condemnor shall give notice to the public of the purpose, time and location of its hearing setting forth the proposed location of the public project including any proposed alternate locations, at least ten but no more than thirty days prior to such public hearing by causing such notice to be published in at least five successive issues of an official daily newspaper if there is one designated in the locality where the project will be situated and in at least five successive issues of a daily newspaper of general circulation in such locality.

(B) In the event that the only newspaper available in such locality is a weekly publication the above described notice shall be published in such newspaper in at least two successive issues.

(C) Failure to notify a person or persons entitled to notice under this section shall not be jurisdictional nor construed to affect the validity of any title acquired by a condemnor under this law.

§203. Conduct of the public hearing

At the public hearing the condemnor shall outline the purpose, proposed location or alternate locations of the public project and any other information it considers pertinent, including maps and property descriptions of the property to be acquired and adjacent parcels. Thereafter, any person in attendance shall be given a reasonable opportunity to present an oral or written statement

and to submit other documents concerning the proposed public project. A record of the hearing shall be kept, including written statements submitted. The condemnor's copy of such record shall be available during normal business hours, at its principal and district offices to the public for examination without cost and shall be reproduced upon written request and payment of the cost thereof. Further adjourned hearings may be scheduled.

§204. Determination and findings

(A) The condemnor, within ninety days after the conclusion of the public hearings held pursuant to this article, shall make its determination and findings concerning the proposed public project and shall publish a brief synopsis of such determination and findings in at least two successive issues of an official newspaper if there is one designated in the locality where the project will be situated and in at least two successive issues of a newspaper of general circulation in such locality. The synopsis shall include those factors set forth in subdivision (B) herein, and shall also state that copies of the determination and findings will be forwarded upon written request without cost.

(B) The condemnor, in its determination and findings, shall specify, but shall not be limited to the following:

(1) the public use, benefit or purpose to be served by the proposed public project;

(2) the approximate location for the proposed public project and the reasons for the selection of that location;

(3) the general effect of the proposed project on the environment and residents of the locality;

(4) such other factors as it considers relevant.

§207. Judicial Review

(A) Any person or persons jointly or severally, aggrieved by the condemnor's determination and findings made pursuant to this article, may seek judicial review thereof by the appellate division of the supreme court, in the judicial department embracing the county wherein the proposed facility is located by the filing of a petition in such court within thirty days after the condemnor's completion of its publication of its determination and findings pursuant to section two hundred four herein. Such petition shall be accompanied by proof of service of a demand on the condemnor to file with said court a copy of a written transcript of the record of the proceeding before it, and a copy of its determination and findings. Upon receipt of such petition and demand, the condemnor shall forthwith deliver to the court a copy of the record and a copy of its determination and findings. The proceeding shall be heard on the record without requirement of reproduction. If such proposed public improvement is located in more than one judicial department such proceeding may be brought in any one, but only one of such departments and all such proceedings with relation to any single public project shall be consolidated with the first filed.

(B) The jurisdiction of the appellate division of the supreme court shall be exclusive and its judgment and order shall be final subject to review by

the court of appeals in the same manner and form and with the same effect as provided for appeals in a special proceeding. All such proceedings shall be heard and determined by the appellate division of the supreme court, and by the court of appeals, as expeditiously as possible and with lawful preference over other matters.

(C) The court shall either confirm or reject the condemnor's determination and findings. The scope of review shall be limited to whether:

(1) the proceeding was in conformity with the federal and state constitutions,

(2) the proposed acquisition is within the condemnor's statutory jurisdiction or authority,

(3) the condemnor's determination and findings were made in accordance with procedures set forth in this article, including, where applicable, a determination that an acquisition is exempt from compliance with this article, and

(4) a public use will be served by the proposed acquisition.

§402. Filing of acquisition maps; vesting

* * *

(B) In all acquisitions under supreme court jurisdiction provided in subdivision (B) of section five hundred one herein, the condemnor, prior to filing an acquisition map within the time prescribed

by section four hundred one, shall obtain an order to acquire such property and for permission to file such map by presentation of a verified petition to the supreme court in the judicial district where the real property to be acquired or any part thereof, is situated, in accordance with the following procedure:

(1) The condemnor shall cause to be filed in the office of the clerk of each county where the real property to be acquired or any part thereof is situated, a notice of the pendency of such proceeding. Such notice shall briefly state the object of the proceeding and shall contain a general description by metes and bounds or by section, block and lot number of the real property to be acquired thereby. It shall also state the names of such of the reputed condemnees of such real property as may be known to the condemnor, and in case any of the condemnees are unknown, a statement to that effect shall be made in such notice.

(2) The condemnor shall, at least twenty days prior to the return date of the petition, serve by registered or certified mail return receipt requested, a notice of the time, place and object of the proceeding upon the last known owner or owners of record of the property to be acquired, as the same appears from the record of the tax assessor of the district wherein such parcel or parcels are located. Said notice shall contain a copy of that portion of the proposed acquisition map affecting the owner's property. At least ten but not more than thirty days before the return date of the application, the condemnor shall also cause a copy of a diagram or

representation of the acquisition map showing the perimeters to be acquired and a notice generally describing the property to be acquired by metes and bounds or by section, block and lot numbers, to be advertised by publishing in at least ten successive issues of an official newspaper if there is one designated in the locality where the property is situated, and in at least ten successive issues of a newspaper of general circulation in such locality. In the event that the only newspaper available in such locality is a weekly publication the above described notice shall be published in such newspaper in at least three successive issues. Where the condemnor has conducted an article two public hearing or when the condemnor is exempt from compliance with article two pursuant to section two hundred six the condemnor may dispense with the requirement of publication in ten successive issues of a newspaper of general circulation. Where practicable, the condemnor shall cause copies of such notice in the form of handbills to be posted for the same period in at least three conspicuous places, upon or near such real property. The inadvertent failure to notify any condemnee, whether of record or not, will not invalidate any proceedings brought hereunder or any title acquired by the condemnor under this law.

(3) The condemnor shall present to the Court a petition verified by an authorized officer of the condemnor setting forth:

(a) a statement providing either the compliance with the requirements of article two of this law, including a copy of the condemnor's determination

and findings or a statement providing the basis of exemption from article two;

(b) a copy of the proposed acquisition map to be filed and the names and places of residence of the owners of the property to be acquired;

(c) a description of the real property to be acquired and its location, either by metes and bounds of each individual parcel, or section, block and lot number, and by reference to the acquisition map and notice of pendency attached to the petition;

(d) the public use for which the property is required;

(e) a request that the court direct entry of an order authorizing the filing of the acquisition map in the office of the appropriate county clerk or register and that upon such filing, title shall vest in the condemnor;

(f) if a non-governmental condemnor subject to the jurisdiction, supervision and regulation of the public service commission or the commissioner of transportation, it shall include in its petition for acquisition, notice that it shall deposit a bond or undertaking with the clerk of the court prior to vesting of title to the real property described in such petition in an amount to be fixed by the court on the return date of the petition. The court shall direct that the bond or undertaking will be applied in the amount necessary, for any default by the condemnor in the payment of all or part of the damages determined in the acquisition proceeding or the abandonment thereof.

The requirement for a bond or undertaking under this subdivision, may be waived by stipulation of the parties. If the amount deposited is insufficient to pay such damages and all costs and expenses awarded to a condemnee, judgment shall be entered against the condemnor for the deficiency, to be enforced and collected in the same manner as a judgment in the supreme court;

(g) if the property is to be used for the construction of a major utility transmission facility, as defined in section one hundred twenty of the public service law, or major steam electric generating facility as defined in section one hundred forty of such law with respect to which a certificate of environmental compatibility and public need has been issued under such law, a statement that such certificate relating to such property has been issued and is in force.

(4) Upon the presentation of the petition and notice with proof of service thereof, an owner of the property may appear and interpose a verified answer, which must contain specific denial of each material allegation of the petition controverted by him, or of any knowledge or information thereof, sufficient to form a belief, or a statement of new matter constituting a defense to the proceeding.

(5) At the time and place mentioned in such notice, unless the court shall adjourn the application to a subsequent date, and in that event at the time and place to which the same may be adjourned, upon due proof of service of notice and upon filing of such petition and proof to its satisfaction that

the procedural requirements of this law have been met, the court shall direct the immediate filing and entry of the order granting the petition, which order the condemnor shall file and enter together with the acquisition map, in the office of the county clerk or register in each county in which the real property or any part thereof is situated. Upon the filing of the order and the acquisition map, the acquisition of the property in such map shall be complete and title to such property shall then be vested in the condemnor.

* * *